A

PRACTICAL TREATISE

OF

POWERS.

BY

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PREFACE.

The subject of the following work embraces a very large portion of the law of real property. It is a subject which demands and must attract the conveyancer's peculiar attention: the connection and symmetry of its parts, while they excite the admiration of the student, will amply repay the labour which the study of it requires.

As a work upon Powers has already been written, which has arrived to a second edition, it may be expected that some reason should be given for presenting the profession with a new one. It may be thought to be a sufficient reason that Mr. Powell's Essay embraces but a partial view of the subject. But had that been the only objection to the performance, his deficiencies might have been supplied without retreading his steps. The execution, however, of what Mr. Powell did

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attempt is not such as to invite to a study of the subject, or to render his work practically useful. It is common to meet with statements of facts, occupying many pages, which serve only to confound the attention, when the precise point decided might have been expressed in the same number of lines. The errors in law, as well as in the statement of facts, are very numerous, and in few instances, is much labour of research exhibited. The author of the present volume, however, wishes it never to be forgotten, that as far as Mr. Powell did treat of the subject, he was the *first* who attempted it.

The writer deprecates too severe an examination of his work from the preceding observations. It is more easy to criticise the works of others, than to write a better on the same subject. His pretensions to notice are, that it has been his endeavour to exhaust the subject: an independent and original view has been taken of every part of it; the *report* of every case has been anxiously consulted; and much labour has been bestowed in examining reported cases, with the Register's books, and searching for cases not in print.

print. The writer has also attempted to treat of this abstruse and intricate learning in a familiar and practical way, to avoid burdensome statements of cases, and to introduce the points decided with as much brevity as appeared to be consistent with accuracy and perspicuity. In no instance has he shrunk from the consideration of the difficulties which presented themselves, although, following Bacon's example, he has directed his endeavours rather to open the law upon doubts, than doubts upon the law. How far he has succeeded in this arduous attempt, it is for the Profession of which he is a member to decide. He has in common with others to plead as an excuse for any inaccuracies in so long a work, that it was written in moments snatched from the labours of his profession, with few opportunities of taking a continued and connected view of the subject.

Stone-Building, Lincoln's-Inn,
12th March, 1808.

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ADDENDA ET ERRATA.

The Case of Webb v. Temple, 83, n. was cited in 3 Ves. jun. 660.

Add a Reference in Note (c) p. 94, to Hixon v. Oliver, 13 Ves. 108, since published.

Add a Reference in note (p), p. 108, to Sturgis v. Corp, 13 Ves. 190, since published.

The Case of Doe v. Manning, mentioned in the note to p. 338, has been since reported by Mr. East (vol. 9, p. 59). The most important Case on the Subject (Taylor v. Stibbert, Treat. Purch. 432, 2d edit.) appears to have escaped the notice of the Court, although it was, I believe, cited in the Argument.

A Case has been just decided, where the trust in a will was "to permit and suffer his niece to receive and take the interest, dividends, and proceeds, of the capital sum of £2100, or so much thereof as should from time to time be vested in his said trustees for the purposes of his said will, during her natural life, for her own sole and separate use and benefit, notwithstanding any husband she might happen to marry, and should pay the same into her own proper hands, for her own separate use and benefit; and that her receipt and receipts alone should from time to time be a good and sufficient discharge and discharges for the same; and that the same, or any part thereof, should not be subject or liable to the debts or engagements, power or controul of any such husband." The question was, whether the niece could make a sweeping appointment. The able Counsel for the defendant gave up the point without argument, and it was accordingly decreed that an absolute sale by her was valid.—Brown v. Like. Rolls, 18th March. 1808. See ch. 2, s. 1, div. iii. of this work.

A

TREATISE

OF

POWERS.

CHAPTER I.

OF THE NATURE OF POWERS BEFORE AND SINCE THE STATUTE OF USES; AND OF THE SUSPENSION, EXTINGUISHMENT, AND MERGER OF POWERS, DERIVING THEIR EFFECT FROM THE STATUTE.

SECTION I.

Powers are either common law authorities; declarations or directions operating only on the conscience of the persons in whom the legal interest is vested; or declarations or directions deriving their effect from the statute of uses. A power given by a will to A to sell an estate, (1) and a power given by an act of parliament to sell estates, as in the instance of the land-tax redemption acts, are both common law authorities. The estate passes by force of the will, or act of parliament, and the person who executes the power, merely nominates the party to take the estate. A power of attor-

(1) This is doubted where a seisin is raised to feed the devise. The doctrine cannot be considered, till the student is made acquainted with the nature of this seisin.

ney is also a common law authority; but the estate is not in this, as in the other cases, actually transferred by the instrument creating the power. It is a mere authority to execute a conveyance in the place of the principal; and the estate, therefore, must be conveyed by the attorney, with the same solemnities as would have been requisite upon a transfer executed by the principal himself. A power to dispose of an estate, or sum of money, of which the *legal* interest is vested in another, is a power of the second sort. The legal interest is not divested by the execution of the power, but equity will compel the person seised of it, to clothe the estate created with the legal right.

To understand correctly the nature of powers deriving their effect from the statute of uses, which it is the principal object of these sheets to elucidate, we must consider, 1st, The nature of trusts before the statute of uses; and, 2d, The effect of the statute.

The simplicity of the common law was admirably adapted to times when transfers of property were not frequent. It was essential to their validity, that corporal possession of the land should be delivered to the purchaser in the presence of his neighbours; thus, every one's title was publicly known, and secret and fraudulent transfers of property never could take place. This mode of transfer was termed a feoffment, with livery of seisin, a conveyance which is still frequently used. And the like strictness required, that estates thus notoriously transferred, should not be defeated by the mere execution of a deed; and, therefore, a power of revocation annexed to a feoffment, was void in its very creation. A condition, it is true, might at all times have been added to a feoffment; but the strict rule

rule of the common law did not permit the breach of such condition to be taken advantage of by any but the feoffor or his heirs, and this principally with a view to prevent maintenance. These rules opposed an effectual barrier to such modifications of estates as prevail at this day. When to this rigour we add, that except in some few places, by force of a custom, lands could not be devised, we shall not be surprised that the wants of succeeding times should invent a mode to defeat the excessive rigour, and subvert the simplicity of the common law. This was effected by the introduction of uses. It is not within the plan of this work, to consider the precise time when, or by whom uses were introduced. The *nature* of them only requires our attention. An use, then, was a mere confidence in a person to whom an estate was conveyed, without consideration, to dispose of it as the person by whom it was conveyed should direct. The estate was regularly transferred to a friend, upon trusts designated at the time; or upon such trusts as should be afterwards appointed by the real owner. But still the person to whom the estate was conveyed, was, to all intents and purposes, owner of the estate at law. It is observed, in Chudleigh's case, that he who hath an use, hath not *jus neque in re neque ad rem,* but only a confidence and trust, for which he had no remedy by the common law: and Serjeant Frowick, afterwards Chief Justice of the Common Pleas, remarked, in the reign of Henry the 7th, that by the course of the common law, *cestui que use* had no more to do with the land, than the meerest stranger in the world. To prevent, in some measure, the consequences of this doctrine, it became usual to have several joint feoffees; so that, on the death of any, the estate might survive to

the others, and not be subject to the dower of the deceased's wife, &c. And it also became customary for the owner himself to be one of the feoffees; nor did any inconvenience result from this practice; the judges held, that although in such case the use was in part suspended, yet it might be disposed of in the same manner as if the entire legal estate was vested in others. This mode of conveyance became indeed so common, that in the statute of uses, to which our attention will presently be called, an express provision was inserted to meet this case

Equity, after some time, and by degrees, assumed the jurisdiction which it now exercises, in enforcing the performance of trusts and contracts, so that the person, who had conveyed his estate, or *cestui que use*, as he was then termed, answers almost precisely to *cestui que trust* of the present day. When uses were once established, and not noticed by the courts of law who acknowledged the legal tenant only, the complication of modern settlements was soon introduced. Thus, POWERS arose; for although it was repugnant to a feoffment at common law, that a power should be reserved to revoke it, yet there was no such repugnancy as to trusts, which were simple declarations, or directions to the person seised of the legal estate, in what manner, and to whom he should convey the estate. And, for the same reason, the owner might direct the trustee to convey as a stranger should appoint, although a power of entry for a condition broken, could not be reserved to a stranger on a common law conveyance.

Equity, however, only lent its aid where there was a valuable or good consideration. The first arose upon a real contract, and was termed a bargain and sale. It

was,

was, in fact, originally a mere contract by A to sell his estate to B, although in process of time it became a mode of settlement, and equity did not enquire into the *amount* of the consideration; the second was also a mere contract or agreement, by a husband, parent, or kinsman, to settle his estate upon his wife, children, or relations. This was styled a covenant to stand seised—Money, rent, or services incident to tenure, were sufficient to sustain the former: the consideration of marriage, and natural love and affection to a legitimate child, brother, nephew, or cousin, the latter. In order to comprehend the doctrines we shall hereafter have occasion to discuss, it will here be necessary to observe, that a *consideration* was only required where the inheritance *remained in the contracting party.* Now a covenant to stand seised, or a bargain and sale, did not transfer the possession to the covenantee or bargainee: it was a mere contract, and was, therefore, termed a conveyance, not operating by transmutation of possession; the party with whom the contract was made was compelled to resort for relief to *equity,* and equity following the rule of the civil law, would not enforce a mere *nudum pactum.* But, where a conveyance did operate by transmutation of possession, as a fine, recovery, feoffment, or release, which vest the legal estate in the conusee, recoveror, feoffee, or releasee, and uses were declared on such a conveyance, there equity did not inquire into the consideration: the real owner having divested himself of the legal estate, it was not necessary to resort to equity, as against him; and the person in whom it was vested being a mere naked trustee, was bound in conscience to execute the directions of the donor. This is clearly

laid down by St. German, who says, that when an use is *in esse*, he that hath the use may, of his mere motion, give it away if he will, without recompense, as he might the land if he had it in possession. But he took it for a ground, that he could not so begin an use without livery of seisin, or upon a recompense or ground; and the doctrine is referred to its true principles.

This important distinction applies closely to the usual conveyance by lease and release. Where the lease for a year is intended to operate under the statute, a valuable consideration is, according to the above rule, absolutely necessary; but *if* valuable, it need not be pecuniary—a pepper-corn rent is sufficient. The *release* operates at common law; and as the common law never requires a consideration upon a solemn conveyance by *deed*, none need be given, although it is usual to express that a nominal consideration, as 10s. was paid; nor is a consideration essential, although uses are declared by the release, as they fall within the above principle. This distinction, which was never denied, was expressly taken in the case of Pawlyn *v.* Hardy, (*a*) where it was determined, that if he in reversion release to the tenant in possession, all his estate, right, title, &c. there need no consideration to be mentioned or proved, it is good without; otherwise, if by grant, &c.

(*a*) Mich. 36 Car. II. B. R. MS.

SECTION II

OF THE STATUTE OF USES.

MANIFOLD frauds were the consequence of the introduction of uses; heirs were unjustly disinherited; the King lost his profits of the lands of attainted persons, aliens born, and felons; lords lost their wards, marriages, reliefs, heriots, escheats, aids; married men lost their tenancies, by the curtesy, and women their dower; purchasers were defrauded; no one knew against whom to bring his action, and manifest perjuries were committed. Several statutes were passed to remedy these grievances, particularly a statute in the reign of Richard the Third, *(b)* whereby it was enacted that all estates, &c. created by *cestui que use*, should be good as against his feoffees. Modes were soon invented of evading these acts. At last, it was thought that all these wrongs would be avoided by, as it is usually termed in conveyances, transferring uses into possession, or, perhaps, to speak more correctly, by transferring or turning uses to possessions. With this view, the statute of 27 H. VIII. c. 10. commonly called the statute of uses, was passed, which enacted that, where any person or persons, stood, or were seised, or at any time thereafter, should happen to be seised of and in any honours, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by any manner of means whatsoever it should be; that, in every such case, all

(b) 1 R. 3. c. 1.

such person and persons and bodies politic, that had, or thereafter should have any such use, confidence, or trust in fee simple, fee tail, for term of life, or for years or otherwise, or any use, confidence, or trust, in remainder or reverter, should, from thenceforth, stand and be seised, deemed and adjudged in lawful seisin estate, and possession of and in the same honours and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates, as they had or should have in use, trust, or confidence, of or in the same; and that the estate, title, right, and possession, that was in such person or persons, that were, or thereafter should be seised of any lands, tenements, or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, should be from thenceforth clearly deemed and adjudged to be in him or them, that had or should have such use, confidence, or trust, after such quality, manner, form, and condition, as they had before in or to the use, confidence, or trust, that was in them.

The statute then provides for the case of several persons being jointly seised to the use of any of them. And contains two savings, 1st, To all persons (other than those person or persons which were seised, or thereafter should be seised of any lands, tenements, or hereditaments, to any use, confidence, or trust) all such right, title, entry, interest, possession, rents, and action, as they had, or might have had, before the making of the act; And, 2d, To all persons seised to any use all such former rights as they had to their own *proper use*, in or to any manors or hereditaments, whereof they should be seised, to any other use.

It has been quaintly said, that uses were, by this act, with

with an indissoluble knot, coupled and married to the land, which, of all the elements, is the most ponderous and immovable.

Whether the Legislature did, or did not, intend to crush uses, it is not material for us to inquire, as it was soon settled that uses might still, as formerly, be raised, upon which however the statute would instantly operate; but neither the Legislature nor the Judges admitted uses with all the latitude of construction with which they were adopted before the statute of uses: Previously to the statute, a mere contract uninrolled by A to sell his estate to B was sufficient, without words of inheritance, to pass the equitable fee to the vendee, but the Legislature, by an act passed immediately after the statute of uses *(c)*, required that to transfer the legal estate by force of that act, such contracts should be by deed inrolled. And the Judges resolved that words of inheritance were absolutely necessary to pass the fee at law. And, at this day, it is clear that a mere contract to sell for a valuable consideration paid, importing a future conveyance, would not raise an use in the purchaser, so as to attract the statute, although by deed duly inrolled, and containing words of inheritance, but still it would, in the view of modern equity, convert the vendor into a mere trustee for the purchaser, and entitle him to call for a regular conveyance.

To the raising of an use which the statute will transfer to a possession, it is necessary that there should be, 1st, one person seised to the use of another, *in esse ;* and, 2dly, an use in *esse*, but whether it is limited in possession,

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(*c*) 27 H. VIII. c. 16. Note, this act did not extend to covenants to stand seised, and only to estates of freehold, or inheritance.

remainder,

remainder, or reversion, is immaterial. Thus, if a man, for a valuable consideration, should contract to sell an estate to another in fee, which contract is properly inrolled, or, as we now term it, should convey his estate by bargain and sale inrolled, equity instantly fastens on the conscience of the vendor, and holds him to be a trustee for, or to be seised to the use of the vendee or bargainee: here then the requisites concur: there is a person seised to the use of another, to whom an use in possession is limited, immediately therefore, *on the inrolment of the deed,* the legal estate by force of the statute of uses, vests in the bargainee as effectually as it would have done at common law by a feoffment, accompanied with livery of seisin or corporal delivery. And, had it not been for the statute of inrolments, the legal estate would have vested upon the execution of the deed.

By an unaccountable construction of the courts of law, it was held that an use could not be limited on an use, that is, that the statute would operate on the first declaration of trust only; thus, if by a bargain and sale, the use is limited to A, and it is then declared that he shall stand seised in trust, or to the use of B, the statute will vest the legal estate in A, and the law will not advert to the trust declared in favour of B.

Perhaps there is not another instance in the books, in which the intention of an act of parliament has been so little attended to. It has frequently been observed by high authority, that there is no magic in words. When therefore the act said that, where one person was seised to the use of another, the legal estate should be transferred to the *cestui que use,* it meant that the person to whom the estate belonged in conscience, should be invested with the legal

legal right to it. Now, if an estate was conveyed to A to the use of B, in trust for C, C was the person entitled to the possession of the estate, and A was evidently seised to his use, as it appeared by the deed itself, that the possession was not intended to remain in B, and there is nothing in the act to prevent the possession vesting in C. And at least it might have originally been held without any violation of principle, that the statute first executed the possession in B, and then again in C; for, admitting that it was necessary to first vest the possession in the use limited to B, it would be difficult to discover any thing in the act, which prevented the possession given by the statute, immediately transferring itself from B to C. This could be effected by two deeds, and why not by one and the same deed? Nor am I satisfied that the Judges intended to hold generally that an use upon an use was void. They determined indeed that, if A, in consideration of money paid by B, bargained and sold land to B, to hold to him and his heirs, to the use of the feoffor for life, in tail, or in fee, or to the use of a stranger, that the uses were void, and B should be seised in fee, *because the consideration and sale implied that the use should be solely in him in fee.* The limitation was deemed repugnant to the habendum. But, suppose it to have been expressed in the deed, that the money belonged to C, and was paid by B on his behalf, and the habendum had been to B in fee to the use of C in fee, it does not appear to have been settled that the use to C would not have been executed by the statute, although clearly an use upon an use. The law must, however, at this day, be considered as embracing every case. The Court of Chancery soon seised upon this narrow construction as a pretext to revive uses under the name of trusts,

trusts, and, accordingly, it was determined that B was in conscience a trustee for C, and should be compelled to convey the estate to him. This equitable branch of jurisdiction was extended by the resolution of the courts of law, that neither copyhold nor leasehold estates could be conveyed to uses upon which the statute would operate. A term of years may of course be created out of a freehold estate by way of use, but when it is once a subsisting interest, it cannot be conveyed to uses. Therefore if it were assigned to A to the use of B, the legal interest would remain in A, who however would in equity be deemed a mere trustee for B.

It may not be irrelevant to observe, that it has been justly thought of real importance to show that the statute of Richard the Third, which is referred to in a preceding page, extends to seisins in fee only, lest it should be thought that the assignment of *cestui que trust* of a term would at this day pass the legal interest *(d)*. And this is proved by the ancient cases, and the modern case of Goodtitle *v.* Jones *(e)*, is also cited as an authority that the statute is not applicable to such a case. But on the contrary, in that case, the court took it for granted, that the statute *did* extend to *cestui que use* of a term for years, but they held that the statute only related to conveyances made for the benefit of the then grantor; whereas in the case before them, the term (which was an old satisfied term attendant on the inheritance) was created, not for the benefit of the grantor, but of a mortgagee. Indeed in a subsequent case *(f)*, Lawrence, Justice, admitted that the statute was cited unexpectedly,

(*d*) See 1 Sand. on uses, p. 41—49.
(*e*) 7 Term Rep. 47.
(*f*) Blake *v.* Foster, 8 Term Rep. 494.

and

and the court were taken by surprise, but he added, that though it certainly did not apply to that case, *on further consideration, the court were of opinion that it extended to other cases* (*g*). In the last case, however, the court held that a lease granted by the husband of *cestuique trust* for life, was not authorised by the statute. The court said, that a contrary construction would in a great measure destroy that system of trusts by which real property is secured to women during their covertures, free from the control of their husbands: but still they considered the statute of Richard the Third as in full force. This however is an opinion which we should not hastily adopt. For, 1st, as to grants made by *cestui que trust* of the *freehold*, it is quite clear that in regard to them the statute is virtually repealed by the statute of uses. When the Legislature gave the possession to the *cestui que use*, the statute of Richard was *functus officii*, and the subsequent revival of uses under the name of trusts, cannot revive the statute, as it was not intended to apply to *modern trusts*. This point has indeed received a legislative adjudication. It appears to have been holden that execution might be sued out on any judgment entered up against *cestui que use*, by force of the statute of Richard the Third, but to prevent any doubt, this power was expressly given by the 19 Hen. VII. c. 15. Now it was deemed clear that this provision would not extend to trusts since the statute of uses, and therefore a similar provision was inserted in the 29 Car. II. cap. 3, commonly called the statute of frauds, and under this act it is, that trust estates are at this day extended for the

(*g*) And see Lord Loughborough's judgment in Russell *v.* Stokes. 1 H. Blackst. 566.

judgment

judgment debts of *cestuis que trust*. 2dly. As to grants by *cestui que trust* of a *term*, the statute certainly does not extend to them. This is very satisfactorily proved by Mr. Sanders; indeed the very point appears to me to have been decided by the case in which it was resolved that the statute of uses did not embrace leaseholds; for the question sent to the Judges by Lord Chancellor Bromley, was, not whether the grant by *cestui que trust* of a term, was good to pass the legal estate, by reason of his taking the legal interest, under *the statute of Henry the Eighth*, but generally whether the grant was good to pass the legal estate; and all the Judges and Chief Baron answered, that the grant of cestui que trust of a term was void, and out of the *statutes* of uses (*h*), which was expressly deciding that they were not within the statute of Richard; and at that period, no statute relating only to lands of which a man was *seised*, was extended to leasehold estates, as of them he had merely a *possession*, and not a *seisin* (*i*). A very strong argument in favour of this doctrine, is that one object of the statute of Henry clearly was to crush the frauds which had sprung up under the act of Richard, and it may reasonably be presumed, that had leasehold estates been within this act, they would have been holden to be within the statute of uses also. One evil intended to be remedied by the act of Henry the Eighth, was frauds on purchasers, to which they were still obnoxious, if the legal estate in leaseholds was left in one, and the use, or equitable estate in another:

(*h*) Dy. 369, pl. 50; see Poph. 76; Jenk. 195; 1 Brownl. 40; 2 Keb. 600.

(*i*) See Mo. 614.

for

for if the legal tenant could assign the estate by force of the common law, and the equitable tenant could also transfer it under the statute of Richard, each might make an assignment to different persons, and so entangle them both, notwithstanding the statute of uses. The decision therefore upon this statute, can only be accounted for on the ground that leasehold estates were *not* within the statute of Richard. This hypothesis derives great support from the opinion of Lord Chancellor Nottingham, that the statute of uses was intended not to extend to all trusts and uses, but only to be coextensive with the statute of Richard the Third (*k*). Lord Chancellor Bacon indeed says, that the reason why the statute of uses does not embrace leasehold estates is, "that the statute meant to remit the common law, and not but that the chattels might ever pass by testament, or parol, and therefore the use did not pervert them;" or as we should now express it, the statute meant to *remit* the common law, and as chattels might at all times pass by will or parol, the use did not alter their nature, and therefore they were not within the scope of the statute. But it would not have been productive of any mischief to have considered chattels real within the act. It is no objection that a testamentary power over them existed before the statute, which the Legislature did not intend to take away: they might still, as formerly, have been bequeathed, although the legal interest was vested in the owner.

It is a strong confirmation of the argument, that the act of Richard did not embrace leasehold estates, that

(*k*) See Barrington on Stat. p. 327 who cites a manuscript treatise of Lord N.'s.

from

from the 22d of Eliz. to the year 1796, a period of two centuries and a half, it was never once contended that a cestui que trust of a leasehold estate was within either the act of Richard the Third, or the act of Henry the Seventh. And at this day there is no subject to which they can apply; trusts of leases as now enforced by equity, were not within the meaning of the statutes. Therefore, *quacunque via data* it should seem that the statute of Richard the Third is now of no force whatever.

It may be observed, that, as at this period, a permanent interest can be gained in a leasehold estate, not subject to be defeated at the will of the freeholder, a modern act, similar to the statute of uses, would certainly receive a different construction. Thus, in a case in the reign of George the First, it appeared that by an act of parliament, commissioners of the land-tax were required to be *seised* of lands, tenements, or *hereditaments*, taxed for the value of 100*l.* per annum. The question was whether a commissioner was duly qualified who was *possessed* merely of lands of 100*l.* per ann. for the remainder of a short term. For the negative, the counsel relied on the construction of the word *seised* in the statute of uses, but the court gave judgment unanimously that the commissioner had a sufficient qualification (*l*).

(*l*) Saunders *v.* Stevens, 1 Com 270.

SECTION III.

OF SCINTILLA JURIS.

Powers before the statute of uses were, as we have seen, mere directions to the trustee of the legal estate how to convey the estate, in truth, they were *future uses* to be designated by the person to whom the power was given: these, when they arose, equity compelled the trustee to observe; and when conveyances under the statute of uses became established, it was still usual to reserve or limit such powers, as the exigencies of the case required: thus, powers to lease, to sell or exchange, to jointure, to charge with portions for younger children, or to revoke the settlement itself, soon became usual. In the reign of Elizabeth, however, it was insisted, that a man having once limited the fee simple in use, could not reserve a power by a future act to defeat the uses, and to raise new ones by force of the same assurance; for as the statute extinguished the use in the possession, it could no more be determined, and new estates created, without a new livery, than an estate in possession. But to this it was answered, that uses were not to be compared to the land itself, being mere accidents inherent to the possession, and built thereon by civil equity: and that the statute only imbued the possession with the quality, form, and condition of the use, but did not effect any alteration in the mode of limiting and raising present and future uses, which remained as before (*m*). And accord-

(*m*) Anon. Mo. 608. The arguments in this case are deserving of the Student's attentive perusal. Mr. Powell has made a considerable part of them serve as an introduction to his work on Powers, although the case is not referred to.

ingly Manwood laid it down in Brent's case, that although the possession was executed to the use, yet the property and quality as abstracted from the possession, should not be drowned in the possession (*n*).

Powers after the statute still remained as mere rights of designation which bound the conscience of the trustee, and the estates to be created by force of them were still clearly *future or contingent uses.* But when a power was executed, as the person in whose favour the appointment was made became invested with the use, he instantly gained the legal estate by force of the statute. Now to attract the legal estate under the statute, it is essential that there should be a use *in esse;* whereas the uses to be raised under powers are not *in esse*, or defined, but until ascertained and limited under the power are merely tantamount to future or contingent uses. What operation the statute had upon *contingent uses* has been the subject of much judicial controversy, and demands our particular attention.

Perhaps no question ever occurred on which the Judges were so divided in opinion; some held that the estate vested in the first *cestui que use,* but subject to the contingent uses which should be executed out of *his* seisin as they arose; but this was soon over-ruled, and it was determined, That an use could not arise out of an use. It is observable, that most of the Judges who espoused the first opinion, also held that the contingent uses bound the land, and could not be barred by any act whatever; others held that the seisin to serve them was, to use their own expressions, *in nubibus, in mare, in terra,* or *in custodia legis;* they also seem to have been

(*n*) See 2 Leo. 16.

of

of opinion, that contingent uses could not be barred. Again some thought that the trustees were merely pipes through whom the estate was conveyed to the uses as they arose, while others thought that so much of the inheritance as was limited to the contingent uses remained actually vested in the feoffees till the uses arose. But according to some of the books, the majority of the Judges held, that there remained not an actual estate, but a possibility of seisin, or a *scintilla juris* in the feoffees or releasees to uses to serve the contingent uses as they arose. And this is expressed to be the law in the modern works written upon uses.

Before the statute of uses, the feoffees to uses were absolutely seised of the legal estate, and, therefore, if *cestui que use* levied a fine, or executed a feoffment, the entry of the feoffees was requisite, because the wrong was done to them, and if such feoffees were disseised before the statute, no use could be executed after the statute, except by their entry; for the statute only executed those uses to which any person was *seised,* which they who were *disseised* of course could not be. Thus, where Robert Dalamere made a feoffment before the statute to several persons in fee, to the use of himself and his wife in special tail, remainder to himself in tail general, remainder to the use of Simon Dalamere his brother, in fee. Robert Dalamere before the statute infeoffed another in fee, who also before the statute infeoffed another in fee, and he made a feoffment in fee over to Simon Dalamere after the statute, who again infeoffed another. After the death of Robert Dalamere, and the first feoffees, the heir of the survivor of such feoffees entered to revive the use to the wife of

Robert Dalamere, and the entry was adjudged to be lawful (*o*).

This case at first view does not appear to be relevant to the point in discussion, but it certainly had considerable influence over future decisions; and cases where a clear seisin existed were confounded with this case where the statute could have no operation till a seisin was regained by entry. The doctrine of *scintilla juris* was first started in Brent's case, which arose six years after Dalamere's case (*p*). The case was, that a feoffment was made by Robert Brent after the statute to divers persons; to the use of himself, and Dorothy his wife, for their lives; remainder to the use of himself, and of any after taken wife, for their lives; remainder to B in fee. Afterwards B with the feoffees, by consent of the feoffor, joined in a feoffment to new feoffees, to the use of the feoffor, and Dorothy his wife, for their lives, remainder to A in tail, remainder to the feoffor himself; and he levied a fine with proclamations to the same uses. The wife died, the husband took a second wife, and died. The second wife, by the assent of the first feoffees, after five years had passed since the fine entered to raise the use to her under the first feoffment. The cause was compromised; but the case is very important, as it shows the difficulties under which the Judges laboured with respect to the construction of contingent uses. This case was first heard in the King's Bench, and in the next year it came on in the Common Pleas, when Mounson held, that the wife might enter of her own authority, and that she was well entitled. His opinion appears to have

(*o*) Dalamere *v.* Sermon, Plow. 346, 10 Elizabeth.

(*p*) Dyer 340 a, 2 Leon. 14, Dall. 112.

been,

been, that future uses could not be barred. And Manwood argued strongly in favour of uses, and held, that the wife was capable of the use according to the will and direction of the donor. He seems to have thought that until the future uses were executed, the feoffees had a fee simple determinable, or that the estate in the mean time resulted to the feoffor. Harper, who was thoroughly acquainted with the reasons and intent of the makers of the act, said, that they intended to pen the statute so precisely, that nothing should be left in the feoffees, but that the whole estate should be executed by the statute, so as the said statute did utterly take out all from the feoffees: and he agreed with Mounson and Manwood. Dyer, Chief Justice, said, that it was to be granted that the statute doth divest all out of the feoffees, yet it doth not divest it before that the use be vested *in cestui que use*; the vesting of the use ought to precede the execution of the possession to it. And he was of opinion, that this future use limited to the second wife did *remain in the feoffees* at first, but that they had destroyed it by their feoffment. He, as well as Manwood, held, that the feoffees had *a fee simple determinable* until the future use arose. He expressly said, that the interest which the feoffees had in the interim, until the execution of all the uses, was *a fee simple determinable*, for the whole interest was not divested or driven out of the feoffees until the whole trust were accomplished, that is, until all the uses limited upon the feoffment were executed, and had their full perfection.

This is according to Leonard's, which is by far the best report of the case. According to Dyer's own re-

port, Manwood and he held that it was necessary for the feoffees to enter to revive the use; and although by the words of the statute the freehold of the land and the fee simple also of the feoffees are vested in the *cestuis que use*, yet, as it is expressed, *adhuc remanet quædam scintilla juris et tituli, quasi medium quid. inter utrosque status, scilicet illa possibilitas futuri usus emergentis, et sic interesse et titulus et non tantum nuda auctoritas seu potestas remanet.* Ultimately, Mounson and Harper were in favour of the second wife's claim, and Manwood and Dyer against it; and thereupon the matter was adjourned into the Exchequer Chamber, where the parties came to a compromise (I).

Leonard's reports were always in high estimation, and from them it clearly appears, that Dyer was of opinion that a sufficient portion of the fee simple to serve the contingent uses remained actually vested in the feoffees; and perhaps he meant the same thing by this doctrine of *scintilla juris*, for he defines it to be an *interest* and *title*, and not merely a naked authority or power. At all events, this opinion was not sanctioned by at least two of the Judges.

In the next year Manning and Andrew's case (*q*) was heard, which was a case nearly similar to Dalamere's case.

Geoffries, Justice, was of opinion, that as to contingent uses, a sufficient estate was left in the feoffees,

(*q*) 1 Leo. 256.

(I) There were several other questions in the case, upon which the Judges were divided—the validity of the limitation itself, the effect of the livery, which was by attorney, &c.

and

and they ought to enter. But Southcote, Justice, held that nothing remained in the feoffees to serve contingent uses, and that, therefore, they could not enter. Wray, Chief Justice, was of the same opinion; he thought that the whole estate was settled in the *cestui que use*, yet subject to such contingent use, and he should render the same upon the contingency. The best construction of the statute, he said, was, that it draws the whole estate of the land, and also the confidence out of the feoffees, and reposeth it upon the lands, the which, by the operation of the statute, shall render the use to every person in his time, according to the limitation of the parties; and also, if any interest doth remain in the feoffees, then if they convey to any person upon consideration who hath not notice of the use, the use shall never rise, which is utterly against the meaning of the parties; and, therefore, to construe the statute to leave nothing in the feoffees, will prevent all such mischiefs. And it is true, at the common law, the entry of the feoffees was requisite, because the wrong was done unto them by reason of the possession which they then had; but now by the statute all is drawn out of them, and then there is no reason that they meddle with the lands wherein they have now nothing to do, and the scope of the statute is utterly to disable the feoffees to do any thing in prejudice of the uses limited, so as the feoffees are not to any purpose, but as a pipe to convey the lands to others; so they cannot, by their release or confirmation, &c. bind the uses which are to grow and arise by the limitation knit unto the feoffment made unto them.

This case is very important. It appears clearly, that the doctrine of *scintilla juris* was not then received as law; and, indeed, that no fixed or settled notions were

formed respecting the operation of the statute on contingent uses; Geoffries thought with Manwood and Dyer, (according to Leonard's report of Brent's case), that a sufficient actual *estate* remained in the feoffees to support the uses, while Southcote and Wray were of opinion that the feoffees were by the statute made mere conduit pipes, and were divested of all estate.

About thirteen years after Manning and Andrew's case, the famous case arose which is constantly referred to as having decided the doctrine of *scintilla juris* (r). I allude to Chudleigh's case.

The case was, that Sir Richard Chudleigh conveyed an estate to the use of trustees, and their heirs, during the life of his son Christopher, remainder to the use of the sons of Christopher successively in tail, remainders over. The feoffees afterwards infeoffed Christopher of the lands before he had a son. For the extinction of the use, the case was argued by analogy to cases before the statute, where the feoffees had the fee simple. Against the land being bound by the use, it was said to be absurd, that confidence can be reposed in land which wants sense, and, against its being in the custody of the law, it was insisted, that it would be absurd for the law which, by its definition, is *sanctio sancti, jubens honesta,* and *prohibens contraria* to be the conservator or preserver of a thing *impious and fraudulent,* which an use is.

The Judges who delivered their opinions were, Popham, Chief Justice of England; Anderson, Chief Justice Common Pleas; Periam, Chief Baron; Justice Clench, Baron Clark, Justice Gawdy, Justice Walmesley, Justice Fenner, Justice Beamond, Justice Owen,

(r) 1 Rep. 120.

and

and Baron Ewens (I). They delivered their opinions *seriatim*, which occupied six days.

Periam and Walmesley argued that the use was not destroyed. They held, that it would be against the meaning and letter of the statute to say any estate, or right, or *scintilla juris* should remain in the feoffees after the statute of 27 Hen. VIII. for it appears by the preamble, that the makers of the act intended to eradicate the whole estate of the feoffees; and by the letter of the body of the act the whole estate, right, title, and possession, is in the *cestui que use*. The Chief Baron said, that Dyer's *scintilla juris* was like Sir Thomas Moore's Eutopia, nor did Walmesley treat it with more respect. They insisted that the seisin which the feoffees had at the beginning by the feoffment, would be sufficient within the act to serve all the uses, as well future when they come *in esse*, as present, for there needs not many seisins, nor a continued seisin, but a seisin *at any time*, so a seisin at one time would suffice; for the statute says, seised at any time, and it would be hard, when the statute requires but one seisin at one time only, that many seisins, and at several times against the intent and letter of the act, should be required.

But then Walmesley insisted, that the future use not having been *in esse*, could not be suspended; nothing remained in the feoffees, therefore they could not affect it; the persons taking under the same seisin could not affect

(I) It is observable, that not one of the several Judges who had already had occasion to consider this point, was then on the bench. They were Dyer, Manwood, Harper, and Mounson; Wray, Southcote, and Geoffries.

it,

it, as it did not derive its essence from their estate, but from the original seisin; and Periam agreed with him, and held, that these uses were *in nubibus*, and in the preservation of the law: and he insisted that the statute did not require the *cestui que use* to be *in esse*.

On the other hand, the remaining nine Judges, or at least eight of them, agreed that the feoffment made by the feoffees *who had an estate for life by limitation of the use* divested all the estates and the future uses also, for these uses ought to be subject to the rule of law, which in this respect is, that he in the remainder must take the land when the particular estate determines, or else the remainder shall be void; and there is no difference when the estate of the tenant for life determines by his death, and when it determines in right by his forfeiture, for in both cases entry is given to him in the next remainder, and then if he cannot take the land when the particular estate determines the remainder is void.

And they held, that the statute could not execute any uses that were not *in esse;* and, after arguing that the statute did not divest the feoffees of the estate, it was held by the two Chief Justices and Fenner, Beamond, Owen, and Ewens, that the *feoffees, since the statute, had a possibility to serve the future use when it came in esse, and that, in the mean time, all the uses in esse shall be vested, and when the future use comes in esse, then the feoffees (if the possession be not disturbed by disseisin or other means) shall have sufficient estate and seisin to serve the future use when it comes in esse, to be executed by force of the statute, and that seisin and execution by force of the statute ought to concur at one and the same time. And they held, that if the possession was disturbed by disseisin or otherwise, the*

feoffees

feoffees would have power to enter to revive the future uses according to the trust reposed in them, unless they did by any act bar themselves of their entry. But the resolution of the eight Judges was merely that contingent uses might be destroyed or discontinued before they came *in esse*, by all such means as uses might have been discontinued or destroyed by the common law; but Periam and Walmesley did not agree to this.

It appears (*s*) that Gawdy was for placing contingent uses on exactly the same footing as contingent remainders; and Clench entirely agreed with him. Gawdy's opinion is worthy of observation; he conceived that the use was executed by the intent, but not by the letter, of the statute, for the purpose was to remove all the estate from the feoffee, and to put it in *cestui que use* wholly, (to wit) in possession to the uses which were *in esse*, and in abeyance as to the uses which were to come and contingent, and now by the same statute the contingency of the possession shall go in lieu of the contingent use, and now an use limited to one for life, with remainder over to the heirs of the body of J. S. shall be in the same manner as if land at this day had been letten to one for life, with remainder over to the heirs of the body of J. S., for the quality which he had in the use, the same (by the very letter of the statute) he shall now have in the possession and estate of the land, and the statute is not to undo any use, but to transfer an estate in the land to the use. But then he agreed that, by the feoffment, the contingent use was utterly destroyed, in the same manner as where a lease is made for life, the remainder to the heirs of the body of J. S., if the tenant for life

(*s*) Poph. 70, 1 Rep. 135 a.

dies,

dies, or commits a forfeiture, and determines his estate in the life of J. S., his heir shall never have the land by remainder, because he was not *in esse* as an heir at the time when the estate ended. As to the principal doctrine, it is merely said in *Popham's* own argument, "And *nota*, that by a disseisin, the contingent use may be disturbed of his execution, but there by the regresse of the feoffee, or his heirs, when the contingent happens, it may be revived to be executed. But by the release of the feoffee, or his heirs, the contingent in such a case, *by Popham*," (observe), "is barred of all possibility at any time to be executed." And according to his own report, he said plainly, that if the exposition made on the other side shall take place, it will bring in with it so many mischiefs and inconveniencies *to the universal disquiet of the realm, that it will cast the whole commonwealth into a sea of troubles, and endanger it with utter confusion and drowning!!*

Lord Chief Justice Anderson's report of this case is indisputably the best (*t*), from which it appears clearly, first, That the Judges were of opinion, that not a mere *scintilla* remained in the feoffees, but a sufficient *estate* to support the uses; and they argued by analogy to the statute of Richard the Third, which enabled *cestuis que use* to grant their estates as if they were seised of the freehold; and upon that statute it was holden, that where a man was seised to the use of one for life, the remainder to another in tail, the grant of the tenant for life did not affect the estate of which the feoffees were seised to the use of the tenant in tail; and,

(*t*) 1 And. 309.

secondly,

secondly, that they went upon the intention of the statute to extirpate uses, and the mischief which would ensue from supporting them.

When Chudleigh's case is attentively considered, our surprise cannot fail to be excited at its ever having been considered as a decisive authority for the doctrine in question. The opinion of the six Judges on this point, as stated by Coke, was merely an *obiter dictum*; and there even appears to be reason to doubt, whether any such opinion was ever delivered (I). In Lord Chief Justice Popham's report of the same case, this opinion is given as coming from himself only. And Lord Chief Justice Anderson, who is made by Coke to concur in this opinion, reports no such matter in his book, but states the opinion of the Judges very differently. Finch, in arguing the case of Heyns and Villars (*u*), said, that it is reported by the Lord Anderson in his private reports, that the Lord Coke (at that time Attorney-General) has greatly abused him and others of the Judges, in reporting such judgments and resolutions, in Shelley and *Chudleigh's* case, as they never delivered. Anderson's severe censure of Coke's report of Shelley's case is in print, and well known, but I have not met with the observation alluded to on Chudleigh's case. It is

(*u*) Infra.

(I) Let not our just admiration of Sir Edward Coke's profound legal learning carry us too far. His system of turning every judgment into a string of general propositions or resolutions, has certainly a very imposing appearance, but it is a system of all others the least calculated to transmit a faithful report. Is it not to be feared, that the bias of a man's own sentiments may involuntarily lead him to pervert the opinions of others, in order to support his own?

observable,

observable, that Finch speaks of the *private* reports of Anderson, and he must have seen the manuscripts of them, as his argument was delivered in 1658, and the first edition of Anderson was not published till 61 years after. The fact, therefore, cannot be doubted, although the censure is not in print. Finch also referred to Popham's reports, p. 83, where it appears, that the opinion respecting the *scintilla juris* was delivered by Popham only.

We may, therefore, safely conclude, that this opinion was merely an *obiter dictum* of Lord Chief Justice Popham's. Indeed, had the whole Court delivered this opinion, yet it would not at this day be entitled to much attention. All the settlements in the kingdom are made by way of use, which is there styled *impious*; and it is observable, that Coke calls the case Chudleigh's case, "*commonly called the case of perpetuities.*" No settled notions then existed as to the time within which contingent uses might be raised; and it is evident, that the Judges were alarmed lest they should introduce perpetuities.

Pollexfen, in his able argument in Hales and Risley (*x*), against the necessity of the feoffees entering to vest contingent uses, says, That at the time Chudleigh's case was adjudged, it was not taken for law, that the destruction of the particular estate by feoffment or conveyance, before the contingent remainder came *in esse*, was a destruction of the contingent remainder. And that though this was so adjudged in Archer's case, (Co. 66), and though that case was reported before Chudleigh's case, yet, that it appeared that Chudleigh's case was

(*x*) Pollex. 389.

first

first adjudged. Pollexfen was right as to the time the cases were adjudged. Chudleigh's case was decided in the 37th, and Archer's in the 38th of Elizabeth, but the last case was first heard in the 36th of Elizabeth; and the opinion of the Judges was, that the contingent remainder was destroyed by the destruction of the particular estate. The decision in Chudleigh's case certainly, however, settled this doctrine, *and was determined on that point simply;* and that decision has always been adhered to (*y*). The argument upon the statute was merely to show, that contingent uses were not protected against the effect of the feoffment. The points decided, were, first, that the contingent uses were destroyed by the feoffment of the tenants for life, by analogy to the rule of law; and, secondly, that they were not saved by the letter or equity of the statute. We should never have heard of this fiction, had it then been settled as I apprehend it now is, 1st. That where such a construction can be put upon a limitation, that it may take effect by way of remainder, it shall never take place as a springing use, (and it even seems to be law, that where a limitation was intended to take effect as a remainder, and cannot, it shall not be supported as a springing use). 2dly, That a *contingent* use, or remainder, must take effect, if at all, *eo instanti*, that the preceding estate ceases; and, 3dly, That *springing* uses must be so limited, as to take effect, if at all, within the period of a life or lives in being, and 21 years afterwards and a few months, allowing for gestation. Perhaps it is not clear that the 21 years and a few

(*y*) Bolls v. Smith, Mo. 545; 2 Ro. Abr. 794, pl. 2. nom. Smith v. Belly; and see Anon. 2 Leo: 178. 3 Leo. 252, and 4 Leo. 233; and Biggot v. Smyth, Cro. Car. 102.

months

months can be taken independently of the birth and infancy of the *cestui que use*. These rules leave no danger to be apprehended from uses, and they must now be supported as the common assurance of the realm.

Hitherto we must admit that this doctrine of *scintilla juris* was not settled.

The case of Wegg and Villers, which first came on in 24 Car. I. is very important on this point, not, indeed, in regard to the judgment, but by reason of the *dicta* of the Judges.

The case was, that Sir Edward Coke covenanted to stand seised to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life, remainder to the use of her first and other sons successively, in tail, reversion to the use of his own right heirs, and afterwards he granted the reversion without consideration, and the former settlement was recited in the deed, and then he made a feoffment of the lands, and the daughter had issue a son. Sir Edward died, the wife entered, then the daughter died, and then the wife, and it was resolved that the grant did not prevent the contingent uses arising, because it was without consideration, and the first uses were recited in the grant, so the grantee had notice, and therefore took the lands subject to the grantor's covenant to stand seised, and the feoffment did not destroy the contingent estate, because the *right* of remainder for life in the daughter, upon which she might have entered, for the forfeiture supported it; for the feoffment of Sir Edward was a forfeiture of his estate for life, and of the estate of his wife in remainder during the coverture, so that the daughter might have entered for the forfeiture during the coverture, and this right of entry was sufficient to support

port the contingent remainder to the sons without question; and when Sir Edward died, and his wife entered, that reduced her estate for life, and the estate of her daughter for life, and so the contingent use was reduced also, and vested by force of the statute of uses in the first son of the daughter. But it was holden by Glyn, Chief Justice, that if in this case the feoffment had been made before any grant of the reversion, the contingent use would have been destroyed notwithstanding the right of entry in the daughter (z).

Lord Chief Justice Roll states, that in the debate of this case, he and his brothers Nicholas and Aske came to five resolutions.

1st, That the estate of a tenant for life in remainder, under a feoffment, would support contingent uses, by reason of his right of entry against the feoffment of the immediate tenant for life.

2dly, That the entry of such remainder man, whether in the life-time, or after the decease, of the first tenant for life, would reduce the remainders.

3dly, That, if such an entry was not made, the contingent *cestui que use* coming *in esse* could not enter; "but, in this case, the first feoffees may enter to revive this contingent use, and then, by their entry, the contingent use shall be settled and executed in the persons entitled to it by the statute of uses; for there is a *scintilla juris* in the feoffees to enter in such cases of necessity to revive contingent uses, because, otherwise, the contingent use will be destroyed."

4thly, That when a feoffment is made to certain uses

(z) 2 Ro. Ab. 796, pl. 11; 2 Sid. 64, 98, 129, 157, nom. Heyns v. Villers.

with remainder over in contingency, and no estate left in the feoffees, and then the feoffees enter on the land and disseise the tenant in possession, and make a feoffment in fee, this does not destroy the contingent use, if the tenant in possession, or any one in remainder, in whom an estate certain was settled before the feoffment re-enters, for his entry shall reduce all the contingent remainders, and make them capable of execution by the statute of uses; because the feoffees are, as it were, conduits to convey the estates, and have not any power left in them to destroy contingent uses.

And, lastly, That when a feoffment is made to certain uses, with divers remainders over in contingency, and no estate left in the feoffees; yet if the estates *in esse* are divested before the events happen, and then the contingencies happen during the divestment, and then the estate *in esse* determine before any re-entry; if the feoffees release all their right in the land, or make a feoffment of the land, or bar their entry by any other means, in that case the contingent use can never be revived so as to be executed by the statute of uses, because the feoffees who had *scintilla juris* in them, in case of necessity to revive the contingent uses, have barred their entry to revive the contingent uses, and no other can enter to revive them, so that they cannot be executed by the statute.

When the same case came before the King's Bench, Newdigate, Justice, thought, that rather than a contingent use should be destroyed, the covenantees might employ their *scintilla juris* to preserve them. And Glyn, Chief Justice, held, that the uses were executed by the covenant, but the contingent uses were not; and where it is said by some that the estate that feeds them

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is *in nubibus,* and by others in *terra,* and by some other in *custodia legis,* until the contingency happen; yet he held, that they are preserved by a *scintilla juris,* which term was first *invented* by my Lord Dyer.

Now these resolutions, which are all in the books on this point that can be considered as of any authority, were probably founded on Chudleigh's case, as reported by Coke, and at most were mere *dicta,* not in any wise necessary to the decision of the court. The two last resolutions it is impossible to reconcile. It is first holden, that a tenant for life may re-enter and revest the *scintilla* in the *feoffees* against their own feoffment, "because the feoffees are, as it were, conduits to convey the estates, and have not any power left in them to destroy contingent uses:" and, secondly, that if the estates *in esse* are divested, the feoffees may then, by release, &c. destroy their right of entry, and so for ever destroy the rising of the contingent uses: that is, "although they have not any power left in them to destroy contingent uses," yet when *their* entry only will, according to this doctrine, revest the uses, then they may effectually overthrow the settlement. What is this "*scintilla juris et tituli?*" If it be an actual interest, it cannot be revested in the feoffees against their own feoffment. If it be not, why should it not be considered in the same light as a collateral power, which the donee cannot destroy.

Wegg and Villers's case arose upon a covenant to stand seised. So did Perrot's case (*a*), which was decided on a point of pleading, or, at least, it was not decided upon the doctrine under consideration (*b*). It is observable, that in this case, Moore treated it as a

(*a*) Mo. 368; 36 and 37 Eliz. (*b*) See 2 Ro. Abr. 795, pl. 8.

doubtful point, whether at that day a future use was a real interest, or that a seisin was requisite at the instant of its rising as it was before the statute of uses. In Wood *v.* Reignold *(c)*, and Bould and Winston *(d)*, the question was, how far uses under a covenant to stand seised could be destroyed, or how far they could be bound by a lease granted by the covenantor before the arising of the use. The point underwent great consideration. But, in the first case, no judgment was given; in the second, the reporters differ as to the judgment.

Sir Thomas Palmer's case *(e)*, likewise, was a covenant to stand seised to the use of himself for life, remainder to Thomas Palmer, his nephew, for life, remainder to the first and other sons of Thomas Palmer in tail, remainder to the right heirs of himself. He was attainted and executed before the birth of any son of Thomas; and it was resolved by Flemming, Chief Justice; Coke, Chief Justice; and Tanfield, Chief Baron; that by the attainder before the birth of the son, any after-born son was barred, and the crown had the fee simple discharged of all the remainders limited to the sons unborn. But note, the reporter adds, that for sundry vehement presumptions of forgery of the deed of covenants it was censured and damned. And three years afterwards the sole question in a case was, whether an use arising by covenants to the right heirs of a daughter yet alive, should so far transfer the remainder in abeyance, that it should not be as a reversion still in the covenantor, whereof livery should be sued after his death, because there was no person in being (which

(*c*) Cro. Eliz. 764, 854; 41 and 42 Eliz.

(*d*) Cro. Jac. 168, Noy 122; 4 Jac. and see Barton's case, Mo. 742.

(*e*) 9 Jac. Mo. 815. See Fearne, 426.

is

is the word of the statute of uses) in whom the land may vest (*f*); and the decision in Hales *v.* Risley (*g*) seems to be in favour of contingent uses under covenants to stand seised (I). Indeed, the author of the celebrated treatise of equity (*h*) refers to this case, as having settled in opposition to the former authorities, that to the raising of the future uses after the statute the regress of the feoffees is not requisite, and that they have no power to bar those future uses, for the statute has taken and transferred all the estate out of them, and they are as mere instruments. So that contingent uses do now, like other contingent remainders, depend upon the particular estate.

We have now gone through all the cases on this subject. The positions which they are generally thought to establish are,—1. That a *scintilla juris* remains in the feoffees, releasees, or conusees to uses to support and feed the contingent uses as they arise;—2. That if a contingent use be divested, an actual entry must be made to revest it, although a *right* of entry is sufficient to support a contingent remainder at common law; and, 3. That by force of this *scintilla* the feoffees, &c. may enter to revest the contingent uses, and by a parity of reason may, by release, feoffment, &c. destroy their *scintilla*, and so prevent the uses arising.

We have seen that this doctrine has never received a judicial decision. There is not a single case in the books

(*f*) Barnes's case, Hob. 74.
(*g*) Poll. 369.
(*h*) Book ii. chap. 6. s. 2.

(I) The profession has great reason to lament that Pollexfen did not preserve a note of the judgments of the court as well as of his own arguments.

in which it was necessary to decide the point. The authorities have, indeed, been generally treated as decisive of the contrary doctrine, but independently of there being no *decision* on the point, it will appear from the foregoing cases, that the following eight Judges, viz. Wray, Chief Justice; Periam, Chief Baron; and Mounson, Harper, Southcote, Walmesley, Gawdy, and Clench, although they differed in some respects, were all of opinion that no right or interest was left in the feoffees. Lord Hardwicke, in one of the ablest judgments ever delivered, said, that in order to determine Chudleigh's case, the Judges entered into very refined and speculative reasonings, some of which (he said he spoke it with reverence) were not very easy to comprehend (*i*): and Lord Chief Justice Willes, in delivering judgment in Parkhurst *v.* Smith (*k*), treated this doctrine of *scintilla* as a *great stretch* in the court, and a commendable *astutia* to *invent* a method to prevent the statute of uses working a wrong, and overturning the intent of the parties. Therefore, had he seen that this invention itself overturned the intent of the parties, it is evident, that he would have discountenanced this *great stretch*, and not have considered it a commendable *astutia*. There are only two or three more Judges on the other side of the question, if we admit the authenticity of Coke's report of Chudleigh's case; and even some of these judges thought that the feoffees took not a mere *scintilla*, but a fee simple determinable; a doctrine which is now entirely exploded. But if we consider Coke's report as inaccurate, which in this re-

(*i*) Garth *v.* Cotton, 1 Dick. 183; and see Hard. 417. (*k*) Willes, 341.

spect

spect it evidently is, then the preponderance of authority is greatly against this fiction.

Considering the point then as still open, we may shortly notice the inconveniencies of this doctrine, and how it relates to the subject before us, and then show by what construction these difficulties may be avoided, and the common law restored, so far as it can consistently with the doctrine of uses; and this will involve the consideration of the real meaning of the statute. I shall first dismiss from my consideration the cases which have arisen on covenants to stand seised, nor shall I consider the nature of contingent uses limited on a bargain and sale. These conveyances do not operate by transmutation of possession, but the estate remains in the covenantor or bargainor, and the uses are fed out of his seisin as they arise. In this respect, they are very distinguishable from conveyances which do operate by transmutation of possession, as feoffments, releases, fines, and recoveries. These vest the fee simple in the feoffees, &c. and the uses arise out of *their* seisin. Now, covenants to stand seised are at this day wholly disused, any further, indeed, than a defective feoffment, bargain and sale, or release, may, where there is a sufficient consideration, in favour of the intention, be construed a covenant to stand seised. And as to bargains and sales, I apprehend, that contingent uses to persons not *in esse* cannot be raised upon them. The following observations, therefore, are confined to uses raised by those conveyances only which do operate by transmutation of possession.

First, then, as to the mischievous tendency of the doctrine under discussion. Take a common marriage set-

tlement to father for life, remainder to his wife for life, with proper limitations to preserve remainder, to the sons in tail. If, as Mr. Fearne remarks, the father should divest the estates, an actual entry must either be made by the mother, or the trustees to preserve, or the releasees, supposing them to be different persons, or the contingent uses to the unborn sons would be defeated (*l*). This is a point never attended to in practice. And Lord Chief Justice Pollexfen has observed (*m*), that "it must not only be enquired what acts the tenants for life have done before the contingent uses came *in esse*, but it must also be known whether the feoffees or their heirs have done no act before those remainders came *in esse*, whereby these remainders should be destroyed." Besides, if we hold that the releasee to uses must have a seisin *at the time the contingent use arises*, we are bound to enquire whether there is such a person in existence. There may be no such person, and thus half the settlements in the kingdom may be defeated.

The doctrine applies with equal force to POWERS, the estates to be created by them are as we have seen contingent uses, and may, under this doctrine, be in like manner destroyed by the destruction of this *scintilla juris*. It would be impossible, perhaps, at the same time, to maintain, according to the fourth resolution in Wegg and Villers, that if the releasees were to disseise the tenant for life, and make a feoffment, his entry would revest the *scintilla* and so support the uses. We should be told more precisely the nature of this seisin. It is clearly descendible we learn, but is it grantable and devisable? Will it escheat? These and many

(*l*) 1 Fearne, 443. (*m*) Poll. 381.

more

more questions must be solved if this fiction is to be supported.

But if limitations to uses can consistently with the statute be construed in like manner as limitations at common law, no mischief will ensue. The law will then be uniform and simple. An use limited to A for life, remainder to trustees to preserve remainder to his first, and other unborn sons in tail, would stand in the same condition as a feoffment at common law to the same uses; the use to A would be vested, and the uses to the sons would be contingent remainders or uses depending on the particular estate, and in case of a feoffment, &c. by the tenant for life would be supported by the right of entry in the trustees. If there were any powers in the deed, the estates to be created under them would, in like manner, be preserved. The releasees to uses *as such* could neither destroy nor support the contingent uses: and now that uses are in most cases subject to the same rules as contingent remainders, such a power is wholly unnecessary.

Lord Chief Justice Wray's construction of the statute is the best, viz. that it draws the whole estate of the land, and also the confidence, out of the feoffees; the which by the operation of the statute shall render the use to every person in his time, according to the limitation of the parties, or, in other words, the true construction is this, that upon a conveyance to uses operating by transmutation of possession, immediately after the first estate executed, the releasees to uses are divested of their whole estate; the estates limited previously to the contingent uses take effect as legal estates; the contingent uses take effect as they arise, by force of, and relation to, the seisin of the releasees under the deed; and any

any vested remainders over take effect according to the deed, subject to open and let in the contingent uses. This, if established, would at once overthrow the fiction of *scintilla juris*, and with it the necessity of an actual entry to revive contingent uses; and would in every other respect place contingent uses on the footing of contingent remainders, which Gawdy thought was the real intent of the act.

To ascertain whether this was the intention of the legislature, it will be necessary to keep in view the provisions of the statute, which are—1. That the *cestui que use* shall be deemed in the possession of the land for the like estate as he had in the use;—2. That the estate of the feoffee, &c. to uses shall be deemed to be in *cestui que use*; and, 3. After providing for the case of joint feoffees to the use of one of them, there are two savings, the one of the rights of all persons "other than those persons which be seised, or hereafter shall be seised of any lands, &c. to any use, confidence, or trust;" and the other of the estates of the feoffees to uses in their own right.

Mr. Fearne, who combats this doctrine of *scintilla juris*, so far as it is supposed to render an actual entry necessary to revest contingent uses divested, argues from the words of the act, which are, that where any person is seised to the use of others, such other persons shall be deemed and adjudged in lawful estate and possession, &c. to all intents, constructions, and purposes in the law of, and in such like estates as they had in the use, &c. But perhaps this is not the strongest ground that can be taken, as the majority of the Judges in Chudleigh's case held decidedly, that by force of these words contingent uses were not executed by the statute, inasmuch as it is required,

quired, that there should be a person entitled to the use before the statute can operate; and they said it was clear that none can stand seised to the use of him who is not, neither can he who is not in *rerum natura* have any use. It is not, however, necessary for us to contend against this opinion.

Lord Chancellor Bacon in his reading on the statute of uses, which was delivered a few years after the decision in Chudleigh's case, admits that the statute did not intend to execute contingent uses (*n*); but, nevertheless, holds that the word "clearly" in the clause, that the estate of the person seised to the use shall be vested in the *cestui que use*, seemed properly and directly to meet with the *conceit* of *scintilla juris* (I), as well as the words in the preamble of extirpating and extinguishing such feoffments, so that their estate is clearly extinct (*o*). And, speaking of the savings, he observes (*p*), that "the first and second cases are not penned with an *ac si*, but absolute, that *cestui que use* shall be adjudged in estate

(*n*) p. 42. (*o*) p. 47. (*p*) p. 50.

(I) In this passage the word *conceit* is evidently used in a sense of contempt, and from this it may be inferred, that Bacon did not consider the doctrine as decided. He would never have treated that as *a conceit* which all the Judges had decided to be the law of the land. He himself was Counsel in Chudleigh's case, and he had no reason to be out of temper with the decision, as his client the Defendant had a verdict. Indeed, he opens his discourse with a declaration, that by Chudleigh's case the statute was reduced to a true and sound exposition, and that he was induced to consider the statute with a view to correct the many doubts and perplexed questions which had since arisen, as, he observes, it cometh to pass always upon the first reforming of inveterate errors.

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and possession, which is a judgment of parliament stronger than any fine, to bind all rights; nay, he observes, the first clause hath farther words, namely, in lawful estate and possession, which maketh it stronger than any in the second clause. For if the words only had stood upon the second clause, namely, that the estate of the feoffee should be in *cestui que use*, then perhaps the gift should have been special, and so the saving superfluous: and this note is material in regard of the great question, whether the feoffees *may* make any regress; which opinion, I mean that no regress is left unto them, is principally to be argued out of the savings, as shall be now declared: for the savings are two in number: the first saveth all strangers rights, with an exception of the feoffees; the second is a saving out of the exception of the first saving, namely, of the feoffees, in cases where they claim to their own proper use. It had been easy in the first saving out of the statute, *other than such persons as are seised, or hereafter shall be seised to any use*, to have added to these words, *executed by this statute;* or in the second saving to have added unto the words, *claiming to their proper use*, these words, *or to the use of any other, not executed by this statute:* but the regress of the feoffee is shut out between the two savings; for it is the right of a person claiming to an use, and not unto his own proper use; but it is to be added, that the first saving is not to be understood as the letter implieth, that feoffees to use shall be barred of their regress, in case that it be of another feoffment than that whereupon the statute hath wrought, but upon the same feoffment; as if the feoffee to an use before the statute had been disseised, and the disseisor had made a feoffment in fee to I. D. his use,

and

and then the statute came: this executeth the use of the second feoffment; but the first feoffees may make a regress, and they yet claim to an use, but not by that feoffment upon which the statute hath wrought."

It is clear, therefore, that Lord Chancellor Bacon, who has written so profoundly on uses, thought, that although contingent uses were not executed by the statute, yet that there was no *scintilla* in the releasees, and that they could not enter.

Bacon's last editor, however, to whom the profession is indebted for a very correct edition of his valuable work, has controverted every one of these positions (*b*). This writer goes over the old ground as to the statute requiring a *person* to whose use another is seised. He adverts to Mr. Fearne's sentiments on this point; and says, that the doctrine which Mr. Fearne opposed was *firmly established by the decision in Chudleigh's case*, How then, he asks, came it to pass, that Mr. Fearne, in questioning the soundness of that doctrine, confined his strictures to the extra-judicial resolution of the Judges in the case of Wegg and Villiers, when there lay in his path *a solemn adjudication in favour of it.* He adds, that it is evident, that Mr. Fearne *wholly misapprehended the principle of the decision* in Chudleigh's case, for he attributes that decision to the determination in law of the particular estate by forfeiture before the birth of the son to whom the contingent use is limited.

The foregoing observations have, it is hoped, demonstrated that the point in question was not decided by Chudleigh's case. It will not be difficult to show

(*b*) N. (k) p. 131; N. (f) (g) p. 150, 151; N. (u) p. 164.

that

that Mr. Fearne clearly comprehended the principles upon which that case was decided. It is observed in the note to Bacon, that it was not adjudged as Mr. Fearne thought, nor made a point in the case; for Coke distinctly tells us, that "the question in the case was no other, but whether the contingent uses before their existence by the said feoffment of the feoffees were destroyed and subverted, so that they should never arise out of the estate of the feoffees after the birth of the issues." Now it should seem from this very quotation that the question was, whether the contingent uses were destroyed by the destruction of the particular estate. Coke, after reporting the arguments of the two Judges who argued in favour of the use, says, and on the other side it was argued by the remaining nine Judges to the contrary. And it was agreed by them all that the feoffment made by the said feoffees *who had an estate for life by limitation of the use* divested *all the estates* and the future uses also. Gawdy particularly observed, that the rule of law was, that he in the remainder must take the land when the particular estate determines, or else the remainder shall be void; and in this case, forasmuch as by the feoffment of the tenants for life their estate was determined, and title of entry; and then, those in the future remainder were not *in esse* to take it, for this reason, their remainders were barred. Of the same opinion was Popham, Chief Justice; Baron Clarke and Owen. The Chief Justice denied the opinion of Gascoigne in 7 Hen. IV. who thought that such remainder should not be defeated by the feoffment of the tenant for life. And, at the end of this case, Coke, summing up the points decided, says, 1st, It was adjudged in this case, that where

where there is a tenant for life, the remainder in tail, the reversion in fee, and the tenant for life enfeoffs him in the reversion in fee, it is a forfeiture of his estate, and shall divest the estate tail in remainder. Indeed, as it appears that Popham only made the observation upon the *scintilla juris*, the decision cannot be accounted for on any other ground. The writer alluded to also relies on Pollexfen's remark, that it was not settled till Archer's case, that the destruction of the particular estate before the remainder came *in esse* was also a destruction of that. This remark has already been observed upon, and I shall only repeat, that the decision in Chudleigh's case appears to be, 1st, That the contingent uses were destroyed by the feoffment of the tenants for life, by analogy to the rule of law; and, 2dly, That they were not saved by the letter or equity of the statute of uses.

To take an original and independent view of the statute, let us suppose a feoffment *before* the statute to A and his heirs, to the use of B for life, remainder to his first and other unborn sons in tail, remainder to C in fee. Now here A retained the *entire fee simple*, and executed the uses as they arose; if we put the case *after* the statute, we should at first, perhaps, be inclined to hold as many of the Judges did, 1st. That the estate for life was absolutely vested in B; and, 2dly, That a sufficient estate remained in A to serve the contingent uses; which would have superseded the necessity of limitations to preserve contingent uses; but then C's remainder is a serious obstacle to this construction, as that is vested in him by force of the statute; and it would be difficult for A to retain a sufficient estate consistently with the vested remainder in C; besides, the words of the statute were satisfied by the possession vesting in B for

for life, remainder to C in fee, and those estates exhausted the entire seisin of the feoffee.

But as on the one hand the legislature never intended to destroy contingent uses; and on the other, the Judges determined, that an estate in contingency was no estate till the contingency happened; it was necessary to support them by holding that the estates would open, so as to let them in as they came *in esse*. Where, however, is the necessity for any *scintilla juris* in the *feoffees?* As we are compelled to hold that the estate is executed in the remainder man, so as to exhaust the seisin of the feoffees until the raising of the use; what is there in the act which should enforce us to say that the estates shall not open and at once let in the contingent uses as they come *in esse?* The intention of the act was to divest the feoffee of every thing: he *was* seised to the use of the unborn *cestuis que use,* and when they come *in esse* the words of the statute are satisfied: the common law is, in a great measure, restored, which it is on all hands agreed was the intention of the act; and a fiction is got rid of, to the mischievous consequences of which we never advert; for the fact is, that no enquiry is ever made to meet the difficulties which arise from this doctrine. No one, for instance, taking an estate under the execution of a power thinks of asking whether the releasee to uses has died without an heir. It behoves us, therefore, not on slight grounds to sanction that which would introduce such serious consequences, and to the effect of which we never practically attend. And at least it is hoped, that this examination of the authorities will prevent us from again being told that this point is too clearly established to be controverted.

SECT.

SECTION IV.

OF THE SEVERAL KINDS OF POWERS DERIVING THEIR EFFECT FROM THE STATUTE OF USES.

HAVING thus attempted to explain the nature of powers deriving their effect from the statute of uses, it remains only, in this chapter, 1st, To class the several kinds of powers upon which the statute at this day operates, and, lastly, To show in what manner they may be suspended, extinguished, or merged.

Powers are either given to a person who has an estate limited to him by the deed creating the power, or who had an estate in the land at the time of the execution of the deed; or to a stranger to whom no estate is given, but the power is to be exercised for his own benefit; or to a mere stranger to whom no estate is given and the power is for the benefit of others. The two first may be distinguished in two kinds, 1st, Appendant or appurtenant; 2d, Collateral or in gross. The third it should seem is a power in gross. The latter are termed powers *simply* collateral.

I. 1. Powers appendant or appurtenant are so termed because they strictly depend upon the estate limited to the person to whom they are given. Thus, when an estate for life is limited to a man, with a power to grant leases in possession, a lease granted under the power may operate *wholly* out of the life estate of the party executing it, and *must*, in every case, have its operation out of his estate during his life. And this, as well as every other power which enables the party to create an estate which will attach on an interest actually vested in himself, is a power appendant or appurtenant.

2. Powers collateral, or in gross, are powers given to a person who had an interest in the estate at the execution of the deed creating the power, or to whom an estate is given by the deed, but which enable him to create such estates only as will not attach on the *interest* limited to him. Of necessity, therefore, where a man seised in fee settles his estate on others, reserving to himself only a particular power, the power is collateral, or in gross. A power to a tenant for life, to appoint the estate after his death amongst his children (*q*), a power to jointure a wife after his death, a power to raise a term of years to commence from his death, for securing younger children's portions, are all powers collateral, or in gross; the estates to be created by them cannot, in any event, affect the life estate of the donee, and are, therefore, correctly termed collateral, or in gross; nevertheless, they are considered as emoluments annexed in privity to his estate, or as a part of his old dominion: and it even seems that a power to a perfect stranger who has no estate limited to him to charge the estate *for his own benefit*, would be deemed a power in gross (*r*).

A power may, with reference to the different estates in the land over which it rides, have different aspects; it may, in regard to one, be a power appendant; in respect to the other, a power in gross. Thus, where an estate is settled to A for life, remainder to B in tail, remainder to A in fee, and A has a power to jointure his wife after his death, this power is collateral, or in gross, as to the estate for life; but appendant or appurtenant as to the remainder in fee. It *may* affect the latter, but can never attach on the former.

(*q*) *Vide infra.*

(*r*) But see Hutchinson *v.* Hammond, *infra.*

II. A power simply collateral is defined by Sir Matthew Hale to be a power given to a party who has not, nor ever had any estate in the land. As where such power is given to a stranger (*s*). This definition, however, is not correct. It is certainly clear, that if a man seised in fee reserve a power of revocation to himself, such power is a power in gross, and part of his old dominion; but although he might formerly have been owner of the estate, the power will be *simply* collateral, unless his interest existed at the time of the execution of the deed, so that by the revocation he would *acquire* an estate. Again it should seem, that a power to a perfect stranger to charge the estate for his own benefit would not be deemed a power *simply* collateral. A power of this nature may, therefore, be thus defined: A power to a person not having any interest in the land, and to whom no estate is given, to dispose of, or charge the estate in favour of some other person. We have seen, that before the statute of uses, *cestui que use* might direct his trustees to convey as a stranger should appoint. When the statute came, it of course operated on the declaration, or direction made by the stranger; and this was termed a power *simply* collateral. Perhaps the best instance that can be given of it, is a power to a stranger to revoke a settlement and appoint new uses to other persons designated in the deed. The usual example given of this power is a power from *cestui que use before* the statute to his feoffees to sell the estate; but this does not give an accurate idea of such a power since the statute. This example is taken from a case heard in the reign of Henry the Seventh, when land, unless by force

(*s*) Hard. 415.

of a custom, could not be devised, except by way of use. The Judges, therefore, considered the will as affecting only the equitable right which they thought might be disposed of by the feoffees, even after they had departed with the legal estate. Since the statute, such a power would be a simple declaration of trust upon which the statute would not operate, and, for a breach of which, equity only could relieve.

This classification of powers is important only with reference to the ability of the donee to suspend, extinguish, or merge the power. And although a scientific arrangement of the work would appear to require that this subject should be considered at the close of the volume, yet we shall find, on a closer examination, that we could not well proceed till this learning was discussed.

SECTION V.

OF THE MODES BY WHICH POWERS MAY BE SUSPENDED, EXTINGUISHED AND MERGED.

We must, therefore, now consider the various modes by which powers may be suspended, extinguished, and merged. And, first, we may soon dispose of powers *simply* collateral, as the donee thereof cannot by any act whatever suspend or extinguish his power (*t*) (1). Thus, it was resolved in Digges's case, that he who hath a power to revoke estates, and has no estate himself in the land, cannot by fine, feoffment, or release, extinguish this power, because it is but an authority and no interest, as, if a *devise* be, that a man shall sell certain land, and the person authorized levies a fine, or executes a feoffment, or releases all his right, yet he may afterwards sell the land (*u*). And the law is the same as to powers created by way of use. Nor can such powers be barred or extinguished by the act of any other person. Therefore, where a stranger had a power to raise a term of years for securing a sum of money, although the freeholder levied a fine, and five years passed without any claim, Lord Hardwicke held, that the power was still subsisting, and might accordingly be exercised (*x*). In the case of Hutcheson *v.* Hammond (*y*), where a testatrix gave a fund to A for life; and, after

(*t*) 15 H. 7. fol. 11. b; 1 Rep. 111, 174; Mo. 605.
(*u*) Mo.; and see acc. Co. Litt. 237 a. 265 b.
(*x*) Willis *v.* Shorral, 1 Atk. 474.
(*y*) 3 Bro. C. C. 128.

(1) This is a case always referred to on this subject. As every one has not the year books at hand, a literal translation of the case is inserted in the Appendix, No. I.

his decease, to his daughter; and willed, that if she should marry without her father's consent, then he should have a power to appoint the fund *to whom he pleased.* It was not necessary to decide the point, but Mr. Justice Buller said, that he was clear the power could not be released, for which he cited Co. Litt. 265 b; Brownlow 210. The first reference is to the case before-mentioned, of a power to executors to sell, and I have not been able to find any thing in Brownlow on this question. But it should seem, that the learned Judge's opinion cannot be supported; for, as the power was for the father's own benefit, it ought, perhaps, to have been deemed a power in gross, which, therefore, as we shall hereafter see, he might release: and although the power was merely equitable, yet, in these cases, equity must follow the law.

As to powers annexed to the land, we may consider, secondly, What acts will *suspend* these powers; thirdly, What acts will destroy powers appendant, but not powers in gross; and so, fourthly, *e converso*; fifthly, we may treat of the cases common to both these powers; and, lastly, we may consider in what cases these powers are merged.

II. Secondly, then, As to the *suspension* of powers appendant and in gross. *With respect to the former*;

If a tenant for life, with a power of revocation, grant a lease, rent charge, &c. to take effect out of his interest, natural equity requires that he should not be permitted to defeat this interest (*y*).

In Snape *v.* Turton, a tenant for life, with general power of revocation, first made a lease for a month,

(*y*) Hard. 415, Attorney-General *v.* Gradyll, Bunb. 92; Goodright *v.* Cator, Dougl. 477.

and

and then, reciting his power, granted the reversion to another in fee, to whom the lessee attorned. And, it was determined, that the lease for a year suspended the power, but only as to the lease, and should be good for the reversion in fee *in presenti*. The decision, however, was, that the lease and release was one assurance and a good revocation (z). In a later case (a), Snape *v.* Turton was cited as an authority, that a lease for years suspends the power of revocation *during the term*, but, it is added, that none would venture on this.

In a case in Moor (b), a man covenanted to stand seised to the use of himself for life, with remainders over, with a general power of revocation. He then made a lease for years to a stranger, and afterwards, during the term, he revoked. The question was, whether he could revoke, or, whether he had suspended his power of revocation by his lease during the term, Coke, Chief Justice, held, that he might revoke all except the term, and that if one make a conveyance with power to make leases, and with power of revocation, if he make a lease, he may revoke for the residue. But the doubt here was, where he had not power to make leases, and yet made a lease. And, at last, the court were divided in opinion. According to Roll, they agreed that he could not revoke during the lease, and it was doubted, whether he could revoke even after the lease.

In a prior case (c) there is an admirable argument

(z) Cro. Car. 472; 1 Jo. 392; 2 Ro. Abr. 263, pl. 2.

(a) Lord Mordant *v.* the Earl of Peterborough, 3 Keb. 305.

(b) Yelland *v.* Ficlis, 788, S. C. nom. Yeoland *v.* Fettis, 1 Ro. Abr. (K) pl. 3.

(c) Anon. Mo. 612; and see Bullock *v.* Thorne, Mo. 615.

against the suspension of the power. It was argued by analogy to the case of a lease by one joint tenant, which will not impede the *jus accrescendi*, to a lease by tenant for life, who might still surrender, and to the case of a lessee for life, with a condition to have a fee, where a lease for years would not suspend the power to increase the estate by the condition. It was allowed, that the lease ought not to be defeated, but it was insisted, that the doctrine of absolute suspension would be highly mischievous, when all men of landed property having made leases would be disabled to revoke, or to make jointures, or advance their issue with the rents and reversions.

At this day, it is quite clear, that a lease for years granted out of the interest of the donee of the power, cannot be defeated by a subsequent exercise of the power, for the power is, quoad *that*, suspended. The question then is, what is the *operation* of a suspension? Does it merely postpone the estates created by the power, or, does it, according to the above opinion in Roll, actually suspend the very right of executing the power? It seems clear, that it only postpones the vesting in possession of the estates, and that a power may be exercised although it be suspended. This seems to have been taken for granted in the case of Goodright *v.* Cator (*d*) where tenant for life, with a general power of revocation, first granted a lease out of his interest, and then revoked *during the term*. And it was determined, that the power was well executed, subject to the lease. And the word "suspension" seems to have been used in the same sense in Snape *v.* Turton. This also was the

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(*d*) Dougl. 477.

opinion

opinion of my Lord Chief Justice Coke. Indeed, the point has been so long considered as settled in practice, that it would now be too late to subvert it, were it even contrary to law; for *communis error facit jus.* But if we recur to first principles, we shall not hesitate to pronounce the point free from doubt. Consider the case before the statute of uses; A, legal tenant for life, and equitable tenant in fee in remainder, first grants a legal lease to B, and then, *during the term,* conveys his life interest, and directs his trustee to convey the inheritance to C. Of the legality of this no doubt can be entertained. The case stands thus, since the statute; the legal tenant for life and donee of the *power,* which comes in place of the equitable fee before the statute, first grants a lease to B, and then appoints to C in fee. It is very right to hold that he shall not defeat his own grant, but what is there, subject to that, to prevent the immediate operation of the statute of uses, when, before the act, the trustee would be clearly seised to the use of the appointee from the very execution of the deed; and the statute expressly extends to remainders. On the one hand, this doctrine cannot be productive of any inconvenience, whereas a contrary determination might, in some cases, actually operate as an extinguishment of the power.

As to powers in gross, they are independent of the estate of the donee, and would not, therefore, be suspended by the grant of a lease. In Edwards *v.* Slater *(e),* it was holden, that where a tenant for life committed a forfeiture by accepting a feoffment, and then exercised a power in gross, and afterwards, a remainder-man en-

(*e*) Hard. 410.

tered

tered and reduced the estates, the power was well executed, as the donee had a *right* to make it. And, on the same principle, it was said, that if the tenant for life had been disseised, and then had exercised his power and had entered, this would have reduced the right to an actual estate.

These observations do not apply to leases granted under the same, or any other power, nor to leases for life, or a total disposition of the estate for life. The former will be a subject of future enquiry; and the latter we are now to consider in treating thirdly of the *extinguishment* of powers appendant.

III. We have seen that a charge on the estate to which the power is appendant suspends the power during the interest granted; it follows, therefore, on the same principle, that a total alienation of the estate must operate as an extinguishment of the power. Thus, if tenant for life, with a power to grant leases in possession, convey away his life estate, the power is gone: it is no longer possible for the donee to execute it, inasmuch as it would be derogatory to his own grant (*g*). When a tenant for life intends to mortgage or sell his estate, and it is wished to preserve his powers, the estate is only demised for a long term, depending on the life of the tenant for life, who is made to covenant with the mortgagee, or purchaser, to exercise the powers as he shall direct. So, where he joins in a recovery, the universal practice is to convey only during the joint lives of him-

(*g*) See Dougl. 293. And see Cooke *v.* Bromehill, Noy 66. Note, the letter L appears to be misprinted for the letter P. See the case. This seems to have misled Sir Matthew Hale. See Hard. 413.

self

self and the tenant to precipe. And it is also customary, in these cases, to insert an express declaration that the demise or conveyance shall not affect, but, on the contrary, be subservient to the powers. These precautions apply to powers in gross as well as to powers appendant, as the object is to leave a reversion in the tenant for life (*h*); and, as the grantee takes the estate subject to the power, no fraud is committed on him, and the power, therefore, may, it should seem, be executed in the same manner as if the donee had not parted with any portion of his estate. Sometimes upon a recovery the estate is conveyed for the joint lives of the tenant to the precipe and the tenant for life; and a clause is inserted for making void the conveyance, in case a very large sum is not paid within a given time to the tenant for life, the money of course is not paid, and then the tenant for life is in of his old estate to which the powers are annexed; nor does this mode affect the validity of the recovery, it being sufficient that the tenant to the precipe has the freehold at the time of suffering the recovery.

Lord Mansfield, indeed, held, that where the conveyance by the tenant for life was only by way of mortgage, the power was not destroyed, as it would be contrary to the intention of all the parties to hold that the power was extinguished (*i*). But in the case of Vincent *v.* Ennys (*k*), it was held by Lord Chancellor King, that a power to a tenant for life to grant leases was destroyed by a mortgage made by him, and a tenant for life in remainder under the same settlement; and the same point was decided the same way a few days be-

(*h*) Vide *post*.
(*i*) Ren *v.* Bulkeley, Dougl. 292.
(*k*) 3 Vin. Abr. 432, pl. 10.

fore

fore (*l*). And the case before Lord Mansfield was certainly decided in opposition to the general sentiments of the profession, and appears to have been grounded on his opinion, that a mortgage was, even *at law*, a mere security for the debt, and not an actual conveyance. Thus, shortly afterwards, he held, that a mortgagee to whom a term had been assigned could not be sued as assignee of all the interest of the mortgagor before he took possession (*m*). But, in Stone *v.* Evan (*n*), before Lord Kenyon, his lordship expressly declared, that he could not subscribe to the doctrine laid down in Eaton *v.* Jaques, and would over-rule it without hesitation (*o*). The cases of Ren *v.* Bulkeley, and Eaton *v.* Jaques, depend so strictly on the same principle, that it is impossible to over-rule one without shaking the other. We may, therefore, consider it clear, that a conveyance of the whole life estate, although by way of mortgage, would now be deemed an extinguishment of a power appendant or appurtenant.

Where an estate is limited to such uses as A shall appoint, and, in default of and until appointment, to him in fee, the power is clearly appendant; and, by a conveyance of his interest, would be destroyed. This point is very important, as the limitation is similar in effect to the usual limitation to bar dower, of which we shall hereafter have occasion to speak. In Penn *v.* Peacock (*p*), an estate was conveyed to a trustee in fee, in trust, to pay the rents to the separate use of a woman for life, and, after her decease, in trust, for such uses

(*l*) Corker *v.* Ennys, ib.
(*m*) Eaton *v.* Jaques, Dougl. 445.
(*n*) Woodfall's L. and T. 113; Abbot on Merch. 14, n. b.
(*o*) And see Mayor, &c. of Carlisle *v.* Blamire, 8 East 487.
(*p*) For. 41.

as

as she should by will appoint, and for want of appointment to her own right heirs. She joined with her husband in conveying the estate by demise, with a fine to a mortgagee. And it was insisted for her, that she had but a mere naked power without any interest, and could not be barred by the fine. Lord Talbot, however, held, that it was a power coupled with an interest, and annexed to her inheritance, and so destroyed by a fine, since that a lease and release, or any other conveyance, will carry with them all powers that are joined to the estate.

This case appears clearly to answer an objection sometimes taken, that where the power only authorizes a disposition by *will*, the title cannot be accepted; for it is clear, that where the party could convey the fee if the power were void, he may make a good title, as he would not be permitted to avoid his own grant by a future exercise of the power. But, where he cannot convey the fee independently of the power, the objection holds as if he was tenant for life of the legal estate, remainder to such uses as he should appoint by *will*, remainder to a trustee in fee, in trust, for his right heirs, there the estate for life and remainder cannot coalesce, but his right heir would take as a purchaser, and, consequently, the destruction of the power would not help the purchaser (*q*).

It is to be observed, that as to the destruction of the power the effect is the same, although the estate is conveyed by operation of law. Thus, it has been determined, that where a man, tenant for life, with remainders over, and the ultimate remainder to himself in fee, with a

(*q*) See Parkes *v.* White, 11 Ves. jur. 209.

power

power of revocation, became bankrupt, the life estate and remainder in fee vested in the assignees, and his power of revocation was gone (*r*).

IV. As to the *extinguishment* of powers collateral or in gross. An assignment of *totum statum suum*, or other alteration of the estate for life, does not affect such a power, so if the donee be tenant for years, and survive the years, still he may exercise his power (*s*), because the power does not fall within the compass of his estate, but takes effect out of an interest not vested in him.

And although the tenant for life assume to pass a fee, yet, if he convey by an innocent conveyance as a bargain and sale (*t*), covenant to stand seised, or lease and release (*u*), the power will not be destroyed, and, that, for this obvious reason, that the conveyances enumerated pass only what the tenant for life lawfully may pass, viz. his estate for life; so, if the donee of a power in gross be only tenant for years, an assignment of his whole term will not defeat his power (*w*). And by a parity of reason, a reconveyance or reassignment to the donee of the power will not affect it.

The cases have generally turned on particular powers, as a power of jointuring, or a power of charging with younger children's portions, but they seem to establish this general principle, that every power in gross may well be exercised, although the donee may have previously parted, by an innocent conveyance, with the estate

(*r*) Anon. Lofft. 71.

(*s*) Savile *v.* Blacket, 1 P. Wms. 777.

(*t*) Edwards *v.* Slater, Hard. 410; Jenkins *v.* Kemis, 1 Ch. ca. 103.

(*u*) Phitton's case cited, Hard. 412; Scrope *v.* Offley, 4 Bro. P. C. 237. See p. 241, where it appears, that the appointee recovered in ejectment.

(*w*) Savile *v.* Blacket, 1 P. Wms. 777.

to

to which it was annexed, in privity. Where a person is tenant for life, with a power to appoint the reversion; or tenant for life, with remainders over, with a power of revocation; in the first case, the power is wholly a power in gross; in the second, it is in gross as to the remainders, although appendant to the life estate. But, nevertheless, it has been doubted, whether, in either case, the donee can exercise his power after having departed with his life estate. Mr. Booth, it seems, entertained this doubt. It is said, that in a case where A was tenant for life, with remainder to such uses as he and his wife, notwithstanding her infancy, should appoint; and they executed an appointment during her infancy, and A conveyed his estate for life, by lease and release, by way of mortgage; he (Mr. Booth) doubted whether a new appointment, on her coming of age, would make good the security, the husband having parted with his estate for life, *which* (he thought) *destroyed the power of appointment.* To avoid any doubt on this point, where A is tenant for life, remainder as he shall appoint, it is usual to first appoint the estate, and then convey the life estate. And this, it is quite clear, may be done by the same deed, although, *ex abundanti cautelâ,* some have exercised the power by one deed, and conveyed the estate by another. It will here, however, be proper to enquire, whether the above opinion can be supported. A difference of opinion has certainly been expressed. In Roll's report of Snape and Turton (*x*), the court said, that if tenant for life, with power of revocation, makes a lease for life, that suspends his power as to the fee. This, however, it is conceived, meant only that he could

(*x*) 2 Ab. 263, pl. 2.

not

not *defeat* the lease for life. In Clarke *v.* Philips (*y*), it is said, that Keeling and Twisden were of different opinions in this point, viz. If he that hath power of revocation over lands make a lease for life, whether it suspends the power only, as a lease for years would do, or extinguish it as a feoffment (I). And, in Herring *v.* Brown, Justice Lutwich said, that if a power of revocation is annexed to an estate for life, and that estate determines before the power is executed, by that means the power is extinguished (*z*). This is all the authority that I have met with in favour of the extinction of the power, and it must be admitted not to be of much weight. For Keeling and Twisden were opposed to each other, and Justice Lutwich's opinion in Herring and Brown was over-ruled by six Judges. On the other hand, the decision in Edwards *v.* Slater is directly the other way. There the donee made a bargain and sale in fee, and Lord Chief Justice Hale expressly said, *that if the bargainor had a power of revocation, he might well execute it after the executing this conveyance* (*a*): and he said, that if the tenant for life had a power of revocation, and should make a lease, that would not destroy his power, *because no estate is displaced by it.* So, in Savile *v.* Blacket (*b*), there was a tenant for 99 years, if he should so long live, with a power to charge the lands; and Lord Macclesfield held, that he would

(*y*) 1 Ventr. 42.
(*z*) Carth. 24.
(*a*) Hard. 413.
(*b*) 1 P. Wms. 777.

(I) Keble states, that Keeling and Moreton were opposed to Twisden. Neither of the reporters states what estate the donee of the power had. 2 Keb. 555, nom. Clerk *v.* Pywell.

have

have had this power though he should have survived the term of 99 years; for still he might have charged the premises therewith; so might he have done though he had assigned over the term: and although this case turned on a particular power, yet it is impossible, without discarding all principle, to distinguish it from the case of a general power (I). Hale's argument, that a lease does not destroy the power of revocation *because no estate is displaced by it*, applies as forcibly to a lease for life as a lease for years, and refers the doctrine to the true ground.

The better opinion, therefore, clearly is, that the power is not in such case destroyed. The contrary doctrine appears to owe its origin to powers having been on their first introduction after the statute of uses assimilated to conditions at common law, which they do not resemble. By the common law, if lessee for life, upon condition to have a fee, made a lease for life, that prevented the estate rising under the condition, *because the privity of estate was destroyed* (*c*). But this could never apply to a power which is *a mere declaration of trust* upon which the statute of uses operates, and this seems to have struck the Judges in Bullock *v.* Thorne (*d*), where Walmesley, Justice, held, that a lease for years does not suspend the power of revocation if it be raised by way of use, *otherwise, if it is of a condition annexed to an estate in possession.* And the court held, that, if one has a power of revocation entire, and he extinguishes, or suspends, the power in part,

(*c*) Lord Stafford's case, 8 Rep. 73. (*d*) Mo. 615.

(I) See the observations on the suspension of a power, *supra.*

he may still revoke for the residue, if it be by way of use, *but not so of a condition annexed to the land.*

V. *As to cases common to both powers.* A present power, not simply collateral, may be extinguished by release to any one who has an estate of freehold in the land, in possession, reversion, or remainder; and thereby the estates, which were before defeasible or chargeable by the proviso, are by such release made absolute (*e*): and where in a deed executing a power there are words which shew that the party has fully executed his power, or which amount to a release of it, he cannot execute it further (*f*); but the intention must appear clearly, therefore a declaration in a deed partially executing a power of jointuring, that it is in bar of dower and thirds, and that the remainder-man shall have the surplus, will not operate as a release of the power, for they are only words put in by conveyancers as of course (*g*).

And where the power is future, and to arise by a contingent event, it may be defeasanced, and thereby utterly annulled (*h*). So it may be defeated in part. Thus, where a man had a general executory power of revocation, and he covenanted not to exercise the power without the consent of the Lord Keeper; and granted that all revocations without such consent should be void, it was determined that the power being executory might well be defeated by a subsequent deed (*i*). But it

(*e*) Albany's case, 1 Rep. 110 b. Co. Litt. 265 b.

(*f*) See 2 Atk. 567.

(*g*) Hervey *v.* Hervey, 1 Atk. 561; Zouch *v.* Woolston, 2 Burr. 1136; and see Earl of Uxbridge *v.* Bayly, 1 Ves. jun. 499.

(*h*) Albany's case, *ubi sup.*

(*i*) Leigh *v.* Winter, 1 Jo. 411; and see Earl of Tankerville *v.* Coke, Mose. 146.

seems

seems to have been doubted whether a power can be released in part (*k*).

If the tenant for life levy a fine, execute a feoffment, or suffer a recovery, all his interest and power is forfeited and extinguished, and he gains a new estate by wrong (*l*). It is not material whether the power is present or future. Fines and feoffments, Sir Matthew Hale has observed, do ransack the whole estate, and pass, or extinguish, all rights, conditions, powers, &c. belonging to the land, as well as the land itself; so a recovery does not only bar the estate, but all powers annexed to it; for the recompence in value is of such strong consideration, that it serves as well for rents, possibilities, &c. going out of, or depending upon, the land, as for the land itself (*m*). Where the fine is levied to the tenant of the land, it will operate by way of extinguishment and release (*n*). But if the fine or feoffment only relate to part of the land, the power remains for the residue of the land (*o*); although in the case of a common law condition the entire condition would be extinct (*p*).

But the *acceptance* of a feoffment by a tenant for life will not destroy a power in gross, as the power was never in the feoffor, nor reserved to him, and by the entry of the remainder-man the estate created by the power will be reduced (*a*).

(*k*) Digges's case, Mo. 605; but see Countess of Roscommon *v.* Fowke, 4 Bro. P. C. 523.

(*l*) Albany's case, 1 Rep. 111, 4 Leo. 133, 219; Digges case, 1 Rep. 175 a. Mo. 603; Edwards *v.* Slater, Hard. 410.

(*m*) King *v.* Melling, 1 Ventr. 225; Savile *v.* Blacket, 1 P. Wms. 777.

(*n*) Bird *v.* Christopher, Style 389.

(*o*) Digges's case, *ubi sup.*

(*p*) Co. Litt. 237 a.

(*a*) Hard. 417; see Shep. Touch. p. 14, as to the distinction between *levying* and *accepting a fine*.

And there are cases in which a feoffment or fine will be deemed not an extinction of the power, but a further assurance of it, or at least merely void.

Thus, if tenant for life, with power of leasing, make a lease by livery, the lease will take effect by the deed, and so the livery comes too late to do any hurt. This is an instance of a power appendant (*b*). So where a power in gross given to a tenant for life was well executed by deed; and he afterwards levied a fine, in pursuance of a covenant in the deed; the fine was considered inoperative, as the power was executed antecedently to the fine (*c*).

In Bullock *v.* Thorne (*d*), it was holden, that if tenant for life, with power of revocation, make a lease for years, and levy a fine for assurance of the lease without use expressed, the power of revocation is not extinct by the fine, but suspended during the term.

In some cases, a fine, accompanied with a deed, will operate as an execution of the power. In the Earl of Leicester's case, the earl having a power of revocation, duly executed a deed, whereby he covenanted to levy a fine to other uses, and then levied a fine accordingly. It was determined, 1st, That the covenant was not of itself a good execution; but, 2dly, That the deed and fine taken together were a good execution of the power (*e*).

In this case, however, it was doubted, whether the power would not have been destroyed had the fine been

(*b*) See 1 Ventr. 291.

(*c*) Thomlinson *v.* Dighton, 10 Mod. 71.

(*d*) Mo. 615; and see Perrot's case, Mo. 368.

(*e*) 1 Ventr. 278. S. C. nom. Wigson *v.* Garrett or Gerrard, 2 Lev. 149; Raym. 239; 3 Keb. 366, 489, 510, 536, 572; and see 11 Mod. 184.

levied

levied before the execution of it. In a subsequent case, the precise point arose. A tenant for life, with power of revocation, levied a fine, and then, by a deed executed a short time after, declared the uses of it, and the deed was executed in the manner required by the power. This case was argued by all the able men of the time, and it was determined by Lord Chief Justice Herbert, Holloway, and Wright, against Withers, that the fine had destroyed the power. The main argument was, that the fine had destroyed the power, and then it could not be restored by the subsequent deed. From this judgment, however, there was an appeal, and it was reversed by six Judges against two, principally on the ground that the fine and deed were but one and the same conveyance, and both together were an execution, and not an extinguishment of the power; for it was agreed, that a fine alone, without a deed, declaring the uses would have extinguished it, but it was said not to be so where there was a deed to declare the intention of the parties at the time of the levying thereof; and though the date of this deed was *subsequent* to the fine, yet that was for no other reason but because the fine ought to relate to the precedent term, though in truth it might be levied in the vacation, and so the deed might be executed at the same time the fine was acknowledged; therefore it would be unreasonable to make a forfeiture or extinguishment of a right merely by relation, which is but *fictio juris* (*f*).

It is to be observed, that this case did not decide that a declaration of uses at any time after the fine would prevent the forfeiture, and operate as an execution of the

(*f*) Herring *v.* Brown, 2 Show. 185; 1 Ventr. 368, 371; Skin. 35, 53, 71, 184; Carth. 22; Comb. 11.

power. Indeed, Mr. Justice Withers, who was the only Judge of the King's Bench that held the power was not destroyed, expressly said, that the fine and deed should be considered as one conveyance in favour of common assurances, *where the distance of time is not apparently long* (*g*). Where it is recited in the deed, that the fine was, at the time of levying it, intended to enure to the uses expressed, it seems that no party to the deed, nor any one claiming under him, can insist upon the forfeiture, as the deed would operate as an estoppel (*h*). But, as against strangers, it is conceived, that it would be left to a jury to say whether the fine was, or was not, levied to the uses subsequently declared (*i*).

Where, as in a case before put, a power is appendant as to some estates, and in gross as to others (*k*); an act of the donee may bar it, so far as it is appendant; and leave it in full force, so far as it operates as a power in gross. Thus, to put the same case, A is tenant for life, remainder to B in tail, remainder to A in fee, and A has a power to jointure. We have seen, that the power is in gross as to the estate for life, appendant as to the remainder in fee. If, therefore, A should convey the fee by an innocent conveyance, he would destroy his power so far as it is a power appendant, and consequently, if the remainder in fee should come into possession, the grantee would not be bound by a jointure created under the power; but the power, so far as it took effect as a power in gross, would not be defeated;

(*g*) Comb. 12.
(*h*) Carth. 24.
(*i*) See Bushell *v.* Burland, Rep. Temp. Holt, 733; 11 Mod. 196.
(*k*) Vide *supra* p. 50.

and,

and, therefore, the jointure would be binding on the estate after A's death, and during the continuance of B's estate tail.

In a former part of this chapter it is stated, that a power to a tenant for life to appoint the estate amongst his children is a power in gross, and consequently it may be released or extinguished. But lawyers of great eminence have been of opinion, that a power to a tenant for life to charge portions for his children, or to appoint the estate amongst his children, is a mere right to nominate one or more of a certain number of objects to take the portions or the estate; and that, consequently, it is merely a power of selection, and cannot be barred by fine. Numerous titles have been objected to on this ground. The force of this objection could not be examined until it was shown that a power in gross could be extinguished.

In a recent case, A, tenant for life (without any limitation to trustees to preserve), remainder to his children as he should appoint, remainder to himself in tail, remainder to himself in fee, levied a fine before making any appointment, and the title was objected to by a gentleman, for whose opinion I cannot but have great respect, on the ground that the power was merely a power of selection, and, therefore, could not be released or extinguished by fine.

It must be admitted, that the power in this case was merely a power of selection, or, as it is generally termed, a power of specification; but it does not appear to follow from that admission that the power could not be released or extinguished. The only ground upon which it can be contended that the power could not be extinguished or released is, that it was a power *simply* collateral;

teral; but as we have seen a power is only *simply* collateral when the donee has no interest whatever in the estate (*i*), and such a power certainly cannot be released or extinguished either by fine, feoffment, or common recovery.

A power appendant, at least as to the life estate, it certainly was not; but it seems to have been a power in gross, which, although it did not arise out of the estate of the tenant for life, must be considered as exerciseable by him for his own benefit, and not as a *mere* collateral power. A power to a tenant for life to jointure after his death is a power in gross (*k*). Now, what is a power to jointure but a power of selection or specification. The tenant for life selects the woman whom he chooses to marry, and then appoints that after his death, *when his estate has ceased*, she shall take the estate for life. Here, as in the case before us, the estate appointed cannot take effect out of the interest of the donee of the power, and yet a power of jointuring, like every other power in gross, may be extinguished by fine (*l*). Indeed, it would be difficult to discover any real distinction between a power of jointuring and a power of appointing to children. In neither case is the donee compelable to exercise his power; and, in each case, the power is annexed in privity to his estate for life, and he has an interest arising from the exercise of his power by the benefits it enables him to bestow. In Edwards *v.* Slater (*m*), a power to a tenant for life to create a lease for thirty-one years to commence after his death, was held by Hale, Chief Baron, and Baron Turner, to be a power in gross,

(*i*) Vide *supra* p. 51.
(*k*) Edwards *v.* Slater, Hard. 410.
(*l*) King *v.* Melling, 1 Ventr. 225.
(*m*) Hard. 410.

and

and to be barrable by a fine or feoffment; Lord Chief Baron Hale said, that where the power does not fall within the compass of the estate, as where the tenant for life has a power to make an estate which is not to begin till after his own estate is determined, such power is not appendant or annexed to the land, but it is a power in gross, because the estate for life has no concern in it; and yet such a power (he added) may, by apt words, be destroyed by release, or by fine, or feoffment, which carry away and include all things relating to the land. This case seems to govern the point before us. Sir Matthew Hale's definition of a power in gross clearly embraces a power to a tenant for life to appoint the estate amongst his children after his death, and the cases are not easily distinguishable.

The doctrine that powers of this nature cannot be released or extinguished is by no means new. It has been frequently urged, but without success; and, in the very case of Edwards *v.* Slater, Baron Rainsford held the power to create the term to be a power simply collateral; but this Lord Chief Baron Hale and Baron Turner clearly over-ruled, which makes the case as strong an authority as can possibly be wished for.

The opinion under discussion owes its origin, perhaps, to powers in gross being frequently termed powers collateral; and the word "collateral" being considered as meaning *simply* collateral. Thus, in Savile *v.* Blacket (*n*), a power to a tenant for life to charge money on the estate was called by the Lord Chancellor a collateral power, and it is observed in a modern publication of much merit (*o*), "That the power in that case is erro-

(*n*) 1 P. Wms. 777. (*o*) 1 Sanders on Uses, 164.

neously

neously called *collateral*, whereas, according to Lord Hale's definition, it was certainly in gross." The observation, that the power in question was a power in gross, is correct; but it was not *erroneously* called *collateral* as a power in gross, and a power collateral (not *simply* collateral) is one and the same thing.

There is, however, still an authority behind, which may perhaps be adduced against these observations. The case to which I allude is Tomlinson *v.* Dighton, reported in many books, which was a devise to A for life, and then to be at her disposal, provided that she disposed of the same to any of her children after her death. She executed the power by lease and release, and a fine; and a question arose as to the due execution of the power. According to the report in Salkeld (*p*), two questions were made, the second of which was, whether this power could be construed as a power appendant to the estate for life, so as, by the destroying of that, it might be destroyed or extinguished, or a collateral one. Powell, Justice, said this was not a power appendant or appurtenant, nor was it in the nature of an emolument to the estate like a lease for life, with a power to make leases for twenty-one years, for that affects the estate for life, and is concurrent with it, and has its being and continuance, at least for some part, out of it; but this power arises after the estate, and has its effect upon another interest, so that the estate for life is perfect without it, and no ways altered nor affected by the execution of it.

Upon an attentive consideration of this case it will appear that the question was, whether the power was appendant, or in gross; the word "collateral" being, as

(*p*) 1 Salk. 239.

we

we have seen, sometimes used as synonymous to the words "in gross." That this was done in the case before us is proved by Mr. Justice Powell's argument, which is to the same effect as Hale's definition of a power in gross in the case of Edwards *v.* Slater. Mr. Justice Powell's opinion certainly was, that the power was a power in gross; and it seems so to have been considered by Mr. Peere Williams, who, in his admirable argument in that case (*q*), in answer to an objection that the power was destroyed, admitted that if the fine had been levied before the lease and release it would have operated as an extinguishment of the power. For he contended, that as the fine came *after* the release *it came too late to do any hurt*; and although he afterwards said, that the power seemed collateral, yet he did not rely upon that position, and cited no other authority for it than the old case of a power to executors to sell, which is clearly a power simply collateral. Parker, Chief Justice, in delivering the resolution of the court, said, that as to the first objection, that the power was extinguished by the fine, it might be answered, that if the power was well executed it was executed by the deed which was antecedent to the fine, and, therefore, it was impossible for the power to be extinguished by the fine (*r*). This appears to be a clear admission by the court, that the power might have been destroyed by fine; as otherwise the answer would have been, not that the fine came too late, but that the power could not have been extinguished by fine.

The late Mr. Powell, however, in his treatise (*s*) of

(*q*) See 1 P. Wms. 149.
(*r*) 10 Mod. 72.
(*s*) Powell on Pow. p. 9. 33.

Powers,

Powers, has considered the power in this case as a power simply collateral. He states broadly, that the court were unanimously of opinion, that the wife had, under the will, an estate for life *only, with a power of specification simply collateral.*

If the learned reader should think that in Tomlinson *v.* Dighton the power was deemed a power in gross, that case alone must have considerable influence on the question under consideration, and, indeed, the very system of powers must be overturned to hold the power simply collateral. Should it be determined that a power of this nature cannot be barred by a fine, the intention of many settlements must inevitably be defeated. If an estate be limited to the children of the marriage, as the parent shall appoint by will, or to the children *living at the parent's decease,* as he shall appoint by deed or will, with a remainder, in either of these cases, to the children in fee; in both these cases no effectual settlement can be made upon, or by a child, until the parent's death. I have put the case of a remainder *in fee* to the children in default of appointment, because it has been contended, that although the power is simply collateral, yet, where the children are tenants in tail, a recovery suffered by *them* will over-reach and destroy the power of appointment. The case has been considered similar to that of Page and Hayward (*t*). To this opinion the author himself once inclined, but further consideration has induced him to consider the point very doubtful. For in Page *v.* Hayward, although the words expressed a condition, yet they were construed to be a limitation; and, therefore, it is the common case

(*t*) Page *v.* Hayward, Pig. App. Com. Rec. 176; 2 Salk. 570.

of

of a vested estate tail, with a limitation over in a certain event, in which case it is quite clear that a recovery suffered before the happening of the event will defeat the limitations over. It is like the case put by Hale, Chief Justice, in Benson *v.* Hodson (*u*), of a tenant in tail, with a limitation so long as such a tree shall stand; and he held that a common recovery would bar that limitation. But, in our case, the question would be, whether, during the life of the donee of the power, the estates to be created under the power would not be considered a *charge* upon the estate tail. Every purpose of such a power might under a contrary construction be sometimes defeated. Suppose a father tenant for life, with an exclusive power of appointment to his children, to sell his life estate, we have seen that he might still execute his power: but if the purchaser were to join with the children in suffering a recovery, the parent would, according to this doctrine, be deprived of the right for which he stipulated by the settlement of selecting the child to inherit his estate. What would be the consequence of this doctrine if A were tenant for life, remainder to B for life, remainder to his children as he should appoint, remainder to his first and other sons in tail: and upon a child coming of age, A, without the concurrence of B, were to join with the child in suffering a recovery? Would not B the father's power be destroyed? There is a wide difference between the *donee* of the power having ability by a recovery to destroy the power, and the remainder-man in tail having the same right. Again, it has been contended, that although the power cannot be extinguished, yet it may be re-

(*u*) 1 Mod. 108; 2 Lev. 26; and see White *v.* West, Cro. Eliz. 792.

leased

leased to the remainder-man in exclusion of the objects of the power, as the donee is equally a trustee for them all. This opinion, however, assumes that the donee *is a trustee* of the power, a doctrine which it would be difficult to support; and even should it be proved, yet ulterior questions would arise. It might be questioned, whether, as he was a trustee, he could bind his discretion during his life; and whether he would not be guilty of a breach of trust in preferring the remainder-man to the immediate objects of the power. But it really seems so clear upon principle as well as authority that the power is a power in gross, that it is not thought necessary to pursue our enquiries on points arising out of the doctrine that the power is *simply* collateral.

VI. It remains only to enquire in what cases a power is *merged*; although, perhaps, in strictness, *merger* in the sense it is here used is but a mode of *extinguishing* a power.

Where an estate was limited to such uses as A should appoint, remainder to himself in fee, great difference of opinion formerly prevailed whether the power was not merged in the fee: latterly, however, it was the universal opinion of conveyancers that the power was not merged.

In the late case of Maundrell v. Maundrell (*x*), it appeared, that before marriage the estate was limited to such uses as the husband should by any deed or will appoint; and in default of appointment to the use of himself for life, and after his decease to the use of his right heirs. After the marriage, the husband conveyed the estate to a purchaser, and it was contended that the pur-

(*x*) 7 Ves. jun. 567.

chaser

chaser was in under the appointment, and consequently that the wife was not entitled to dower.

But the court said, that "the power of appointment was merely nugatory, and nothing distinct or different from the fee. The fee was clearly in the husband until appointment. In Goodhill *v.* Brigham (*y*) it was held, that a power added to the fee was merely void. So the power in this case, followed by a limitation of the fee, must be absorbed in the fee which includes every power. The reason commonly given why a power may have effect though limited to the owner of the fee, is, that he may appoint in a mode by which his legal fee would not entitle him to convey: I give no opinion upon the sufficiency of that reason; but in this case it is to such uses as he should appoint by deed or will legally executed, and by those instruments he might have passed the fee, though nothing was said about the appointment. The limitation, therefore, operates purely as a limitation of the fee, and that fee he could only convey subject to her right of dower."

From this decision there was an appeal to Lord Chancellor Eldon. The point could not but be highly interesting to a conveyancer; and as the author had made some observations on the doctrine, he took the liberty of sending them to Lord Eldon shortly after the appeal was lodged. This he was induced to do from observing that the point had really come on at the Rolls by surprize, and the material authorities had not been referred to. So little is to be met with in the Books on this subject, that he shall make no apology for inserting the argument alluded to.

(*y*) 1 Bos. and Pull. 192.

After

After adverting to the decision at the Rolls, and stating that Lord Ashburton had also taken an objection to the power, contending that the separate existence of a power of appointment was incompatible with the ownership of the fee; it proceeded thus:

"In Sir Edward Clere's case, however (z), upon a feoffment by a person seised in fee to such uses as he should appoint by will, it was settled by all the Judges of England (a), after great consideration, that by operation of law the use vested in the feoffor, and he was seised of a qualified fee, (that is to say) till declaration and limitation were made according to his power; and, 2dly, If in such case the feoffor by his will limit estates according to his power reserved to him on the feoffment; then the estates shall take effect by force of the feoffment, and the use is directed by the will, so that in such case the will is but declaratory. But that if he devised his land without reference to his authority, there it should pass by his will, for the testator had an estate devisable in him, and power also to limit an use, and he had election to pursue which of them he would. The case of Goodhill *v.* Brigham, which was referred to at the Rolls, was a devise to a feme covert in fee, with a power superadded to dispose of the estate without the control of her husband, and the power was held to be void. In this case the court of Common Pleas seemed to favour the doctrine since espoused at the Rolls. Le Blanc, Serjeant, defined a power to be an authority enabling one person to dispose of the interest which is vested in another; and Buller highly approved of this definition, which was of course denying the va-

(z) 6 Rep. 17. b.

(a) See Parker *v.* Sir Edward Clere, Mo. 567.

lidity

lidity of a general power of appointment limited to a person with remainder to him in fee (*b*). Now according to Sir Edward Clere's case a power may be defined to be an authority enabling a person to dispose, through the *medium* of the statute of uses, of an interest vested either in himself, or in another person. Buller, after commending the definition, said, suppose by transposing the clauses we could construe this to be a devise to such persons and uses as E. Rogers (the feme covert) should appoint, and for want of such appointment to her and her heirs. If the devise had stood thus she could have taken nothing till her death, or till her appointment, which he argued would have overthrown the testator's intention. This position clearly subverted the definition of which he had before so highly approved, and is another authority for the existence of the power in question; and if the devise would have admitted of this construction, the decision may be doubted, as, notwithstanding Buller's opinion, it is now too late to contend that the wife would not have taken a vested estate subject to be divested by the execution of the power; and, indeed, Buller himself, about a month afterwards, expressly recognized this doctrine (*c*). At any rate, the husband would in equity have been a mere trustee for the wife (*d*). To return, however, to the point before us, for it is not my intention to investigate the case of Goodhill *v.* Brigham, any further than it relates to this point, I am happy to find, that in a case before the late Lord Alvanley when Master of the Rolls (*e*), in which,

(*b*) See 10 Ves. jun. 265, on the appeal.

(*c*) See 3 Ves. jun. 661; and see post ch. 2. s. 4.

(*d*) See Bennet *v.* Davis, 2 P. Wms. 316.

(*e*) Cox *v.* Chamberlain, 4 Ves. jun. 631.

upon the authority of Goodhill *v.* Brigham, it was contended, that a general power of appointment was absorbed in the fee limited in default of appointment to the person to whom the power was given, his lordship said, I shall not enter into the question whether upon the case of Goodhill *v.* Brigham the power could not have been exercised. I think, notwithstanding that case, he might have appointed a use under the power, for I do not conceive the Judges meant to decide that when there is a conveyance to such uses as a man shall appoint, and in default of appointment to his own right heirs, the party may not, under the power, create an estate that will supersede the estate in fee, though perhaps not to bar dower. If that case is taken in the full extent it is very doubtful, and would set aside half the conveyances in the kingdom; and I desire to be understood that it is not my opinion.

Lord Hardwicke also appears to have acceded to the doctrine in Sir Edward Clere's case; for in the case of Peacock *v.* Monk (*f*) he said, an estate might be settled to the separate use of a feme covert by way of power over an use, as if she conveyed the estate to the use of herself for life, remainder to the use of such persons as she by any writing, &c. should appoint, and in default of appointment to her own right heirs.

So in Tickner *v.* Tickner (*g*), where Henry and Robert Tickner were seised of an estate in gavelkind as heirs of their father. Robert made his will, and devised his undivided moiety to his wife Elizabeth T. and her heirs. After making his will, by a deed of partition between Robert and Henry, and by a fine, all the

(*f*) 2 Ves. 190. (*g*) 3 Atk. 742, cited.

gavelkind

gavelkind estate which Robert had devised, was allotted entirely to Robert, to such uses as he should appoint by deed or writing, and in default of appointment to him in fee. This transaction was holden to be a revocation of the will. Now it had previously been decided, that a partition by deed and fine would not revoke the devise where the estate was limited to the devisor in fee (*h*). (I). In the case of Tickner *v.* Tickner, therefore, it was clearly considered that the power of appointment was not merely nugatory, in which case it could not have operated as a revocation, but on the contrary, that the fee could be divested by an execution of the power. It is observable, that of the many Judges who have commented on these cases (*i*), no one seems to have thought the power of appointment void. On the contrary, Lord Hardwicke, Lord Rosslyn (*k*), and Lord Eldon (*l*), appear to have considered that the cases of Tickner *v.* Tickner, and Luther *v.* Kidby, can well stand together, which can only be on the ground of the power of ap-

(*h*) See Luther *v.* Kidby, 3 P. Wms. 170. n. April, 1730.
(*i*) See 2 Ves. jun. 157, 429, 662; 6 Ves. jun. 219.
(*k*) See 2 Ves. jun. 429.
(*l*) See 8 Ves. jun. 281.

(I) The case of Webb *v.* Temple, 1 Freem. 542, which I do not remember to have seen cited, decided this point long before the case of Luther and Kidby. A man being tenant in common of a third part of a manor made his will, and devised all his interest in the manor; and afterwards a partition was made, and a fine levied to corroborate this partition; and the question was, whether this fine and partition was a revocation, or not; and it was adjudged by the Chief Justice and Tracy against Blenco that it was no revocation, because there was no intent to revoke, nor any material alteration of the estate; for whereas the devisor before had a third part of the manor. Mich. Term, 1683.

pointment being valid. Heath, Justice, seems even to have thought that a claim of dower might be barred by an execution of the power (*m*); and Lord Alvanley made two decisions similar to that of Tickner *v.* Tickner (*n*), (in one of which Mr. Justice Barrington concurred) notwithstanding the point of the power being merged in the fee was expressly urged against the revocation (*o*). But Lord Alvanley said, there was a power to dispose which he agreed was not larger than the fee, but it was a different power of disposition, he could grant it by a single paper, he could not convey the fee except by the common modes of conveyance, and though the power was not larger, yet it was to be executed in a different manner.

Indeed, from Sir Edward Clere's case to that of Maundrell *v.* Maundrell, with the exception of Lord Ashburton's opinion, and the supposed opinion of the Judges in Goodhill *v.* Brigham, it has been considered clear that the power in question was not absorbed in the fee, and innumerable conveyances have been prepared on that opinion.

The reason generally given in favor of the existence of the power appears to be too well grounded to be easily answered, and it prevails as much in the case of Maundrell *v.* Maundrell as in any case whatever; for even admitting that the power implied that the deed or will ought to be legally executed, yet if the power subsisted the estate might have been conveyed by virtue of it, without the necessity of the person to whom it was

(*m*) See 3 Ves. jun. 657.

(*n*) Kenyon *v.* Sutton, 2 Ves. jun. 601, cited; and Notts *v.* Shirley, ibid. 604, n.

(*o*) See 8 Ves. jun. 115.

conveyed

conveyed previously taking possession of the estate, or the possession being vested in him by force of the statute of uses, which must have been done if the power was absorbed in the fee. Besides, the point does not seem open after the case of Tickner *v.* Tickner, in which the same words were used.

Upon the whole, therefore, there is a decision by all the Judges of England, given after mature deliberation, and acknowledged by many subsequent Judges, in favor of the existence of the power; and, on the other hand, in favor of the absorption of the power, there is Lord Ashburton's private opinion, to which no attention has ever been paid; and the decision at the Rolls where the authorities which settled the contrary doctrine were not adverted to.

Before quitting this subject, we may remark, that upon its being settled that in these cases the fee was vested subject to be divested by an execution of the power, it was doubted whether a right of dower which had attached on the estate could be over-reached by an execution of the power. The late Mr. Fearne, and many other gentlemen of the greatest eminence, thought the execution of the power defeated the right to dower, and it has never been directly settled that it will not. From this doubt, however, and because a power of appointment is liable to be suspended and destroyed, and the existence of the power is in a case of this nature, the only circumstance which precludes the wife from her dower (*p*), it is usual to require a fine on the part of purchasers; and conveyancers in this as in all other cases where a person has a power, and also an interest, *ex abundanti cautelâ*, generally make him not only exercise

(*p*) N. 2. Co. Litt. 216 a.

his power, but also convey his interest. To this practice and the decisions that a devise to such persons as A. shall appoint is a fee, I am persuaded that the denial of *the existence of the power owes its origin.*"

When the case came before Lord Eldon, he expressed himself dissatisfied with the decision in Goodhill *v.* Brigham; and upon the authority of Sir Edward Clere's case, Lord Hardwicke's opinion, and the cases before cited on partitions, and upon the general practice of conveyancers, he held clearly that the power might well subsist with the fee. In the case of Roach *v.* Wadham (*p*), which was decided six months *before* Lord Eldon made his decision, and in which the same point arose; it was erroneously stated that the decree at the Rolls in Maundrell *v.* Maundrell had been reversed in the House of Lords, and thereupon the counsel on the other side admitted that the power was not merged in the fee, and the Court of King's Bench in delivering judgment took the point for granted.

There are still, however, two cases which escaped the attention of every one. I allude to Cross *v.* Hudson (*q*), before Lord Thurlow; and Dobbins *v.* Bowman (*r*), before Lord Hardwicke; to which I might add the case of Abbot *v.* Burton (*s*). In the first case, an estate was conveyed to John Hay for life, with remainders over, with the ultimate remainder to the use of *the survivor* of him and his wife in fee. And a power was given him, in the usual terms, to appoint 100*l.* a year to take effect after his decease. He exercised this power by his will. His wife died in his life time, and all the intermediate remainders became inca-

(*p*) Roach *v.* Wadham, 6 East. 289.
(*q*) 3 Bro. C. C. 30.
(*r*) 3 Atk. 408.
(*s*) *Vide infra.*

pable

pable of taking effect, so that he was seised in fee, and Lord Thurlow held, that the power was merged by the accession of the fee.

This case is not precisely like Maundrell and Maundrell. There the donee of the power acquired the *estate* immediately on the execution of the deed creating the power, so that unless the power had been upheld it would have been void in its creation. But here the donee had not any estate at the execution of the deed in which the power could, under any construction, be absorbed, and consequently the decision that the power was merged by the accession of the fee did not wholly strike the power out of the deed creating it, as from its execution, for the power subsisted until the happening of the contingency, which cast the fee itself on the donee. But although the cases may thus be distinguished, yet the *principle* of the decision was over-ruled by the case of Maundrell and Maundrell. The counsel who argued in Cross and Hudson in favor of the extinction of the power, rested their case on the simple ground that a power could not subsist in the person having the fee. It was said, that wherever a less estate and a larger coincide in the same person, a merger takes place, as an estate *pur auter vie* will merge in an estate for the party's own life, and a base fee in an absolute fee. In this case, it was added, it was the estate of the wife, who gives to the husband a power which is a mode of property or interest in the land: *the same person cannot have a partial ownership and an absolute dominion, the interest being of the same kind, and only inferior in degree.* Lord Thurlow in delivering judgment adopted these arguments, for he merely said, he thought with the defendants that the power was merged. Now the

above arguments are precisely those which were overruled in Maundrell and Maundrell. As the power then *may* subsist with the fee, why, it may be asked, should it be considered as extinguished? This construction would in many cases work great injustice. For instance, where the power is in gross as to the life estate, and consequently not to take effect till after the donee's death, although he duly execute the power by will before the happening of the contingency, yet the execution will be avoided by the accession of the fee. The courts will, indeed, make his interest in the fee bear out his disposition, but still that in many cases might not be equally beneficial with an appointment under the power. Besides, should the case of Cross *v.* Hudson be supported, it may be thought, that if a man having a particular power gain the fee by descent, or subsequent conveyance, the power will be merged; in which case a prior execution of it by will would be void, and could not be made good out of the fee, as the testator was not seised of it at the execution of his will. But there appears to be no solid ground upon which this distinction can be supported. In many cases the fee is taken not strictly under the instrument creating the power, but by way of resulting use; yet it is settled, that the power may subsist with this resulting fee. It frequently happens that a tenant for life of an estate in strict settlement with the ultimate remainder to himself in fee, with powers of leasing, jointuring, charging portions, sale and exchange, &c. acquires the fee by the failure of the limitations intermediate between his life estate and remainder; and it may be questioned, whether all these powers continue after the accession of the fee. Perhaps the better opinion is, that the powers cannot be exercised after the union

union of the estates, on the ground, not that the powers are merged, but that, according to the true construction of the settlement, they were not to endure beyond the continuance of the limitations which they were intended to over-reach (*t*). To this there could be no objection, as it would not affect any prior exercise of the power although by will. Of course where the power has been executed by deed, the accession of the fee will not invalidate the execution.

In the case of Dobbins *v.* Bowman before referred to, the uses of a recovery were declared, to the use of Henry Reynall in fee, *and* to such uses as he by his will, or any instrument in writing by him duly executed, should limit and appoint. He exercised this power by his will, and it was insisted that the will was void, as an use could not be limited on an use: but although Lord Hardwicke admitted this rule, yet he thought the word *and* must be understood disjunctively for the word *or*, but, at any rate, he thought the estate passed by the will. This case then is another authority in favour of the existence of a general power given to the tenant in fee. This point was taken for granted both at the bar and upon the bench. So Lord Chief Justice Trevor, in delivering the judgment of the court in the famous case of Abbot and Burton, treated it as clear, that a remainder limited to a married woman in fee, with a power to her during the coverture to dispose of it as she should think fit, was a valid limitation, and that the power subsisted, and might be legally exercised (*u*). And Lord Kenyon, I find, when at the bar, gave an opinion in favour of the limitation.

(*t*) See and consider Mortlock *v.* Buller, 10 Ves. jun. 292. Note, there the trustees had the power. (*u*) 11 Mod. 181.

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In Goodhill *v.* Brigham before referred to, the devise was to a married woman in fee, with a power superadded for her to dispose of the estate as she should think proper, and as if she were sole. The Court of Common Pleas held this power to be void, as repugnant to the fee before vested in her. This decision, however, cannot be relied on. It has never been spoken of with satisfaction. If the opinions in Dobbins *v.* Bowman, and Abbot and Burton were correct, it is clear, that the court might have considered the devise as giving her a power of appointment with a remainder in fee. It was much more difficult to make this construction in those cases, as the question there arose upon a limitation in a *deed.* I have seen an opinion of the late Lord Rosslyn's, given in the year 1775, where the estate was limitted by a fine and declaration of uses, to the use of C. M., a married woman, in fee, "together with such powers as are hereinafter mentioned and reserved (that is to say), That it should be lawful for her to appoint any new, or other use or uses, estate or estates," &c. in the usual way. The question was, whether the power was well created. He wrote the following opinion: "The intent of the deed is clearly to give Mrs. M. an option to dispose of her estate, notwithstanding her coverture; and that construction of the words which will give effect to the clear intent of the deed and not destroy it is certainly the best construction. The fee limited to Mrs. M. is qualified in the very sentence itself by the powers after mentioned, inserted for no other purpose but to enable her to dispose of that fee, and which are to take effect out of the very estate given to her. *The deed would have been more properly drawn if the first use declared had been to such person or persons, and for such*

such estates as she by deed or will should appoint; and in default of appointment to her in fee; but it is exactly the same thing in substance to limit the estate to her in fee, subject to her power of appointment; for whoever claims as heir to her must, by the express terms of the deed, take subject to the power of appointment; and if it is well executed, as in this case it appears to be, the execution of the power defeats the title of the heir."

From this opinion it may be inferred that Lord Rosslyn would not have agreed with the decision in Goodhill *v.* Brigham had that case come before him; and it clearly shews that he thought an estate might be effectually limited to such uses as a person should appoint, remainder in default of appointment to the same person in fee. In a case before Lord Kenyon he treated it as wholly immaterial in what part of the deed powers are inserted, whether before or after the estates created (*w*).

(*w*) Rex *v.* the Inhab. of Eatington, 4 Term Rep. 177.

CHAPTER II.

OF THE CREATION OF POWERS.

SECTION I.

OF THE WORDS BY WHICH POWERS MAY BE CREATED.

To the valid creation of powers it is essential that there should be first sufficient words to denote the intention; secondly, an apt instrument; and, thirdly, a proper object. Of each of these I propose to treat in its order: and then, lastly, to shew the effect of the creation of a power on the estates limited in the instrument creating it.

First, then, no precise form of words is necessary. Powers we have seen are mere declarations of trust, and, therefore, any words, however informal, which clearly indicate an intention to give or reserve a power are sufficient for the purpose (*x*). The same rule prevails as to common law authorities created either by will (*y*) or deed. Neither is it material in what part of the instrument the power is inserted (*z*). So a recital or preamble in a deed may operate as a good reservation of a power (*a*);

(*x*) Anon. Mo. 608; Snape *v.* Turton, 2 Ro. Abr. 262 (B) pl. 3; Bishop of Oxon *v.* Leighton, 2 Vern. 377; and see Fitzg. 222.

(*y*) Earl of Stafford *v.* Buckley, 2 Ves. 170; Warneford *v.* Thompson, 3 Ves. jun. 513.

(*z*) Rex *v.* Inhab. of Eatington, 4 Term Rep. 177.

(*a*) Fitzgerald *v.* Fauconberge, Fitzg. 207.

but

but a recital in a deed of an invalid prospective power will not operate as a reservation of a new power, although if the error had been discovered the donee could have created a new power (*b*). This can only be understood by an example: In Hele *v.* Bond a general power was given to appoint and revoke *toties quoties;* the donee in a deed of appointment executed under this power recited the power fully, but neglected to reserve a new power of revocation, which he might have done; and it was determined that the recital of the old power did not operate as the reservation of a new one.

It was at first doubted whether a power deriving its effect from the statute of uses was well limited, unless there were words in the assurance that the feoffee and his heirs should stand seised to the uses to be created by force of the power (*c*). In old precedents such a clause was usually inserted. This practice has been long discontinued, and it is clear, that at this day it is wholly unnecessary.

In old precedents of settlements it is not unusual to meet with powers by which the donees are authorized *to limit and appoint* the estates which they are enabled to create. In later times, the mind being carried to the *effect* of the *act* to be done, and not to the *mode* in which it was to be exercised; it became usual to empower the donee to "lease, sell, exchange," &c. and not to limit or appoint by way of lease, sale, or exchange. In fact, both forms are accurate; the ancient mode describes the *operation* of the act, the modern practice points out the *effect* of it: and, when it is con-

(*b*) Hele *v.* Bond, *infra* Appendix, No. 3, MS.

(*c*) Poph. 81.

sidered

sidered that the power is equally well created, whether words denoting the operation, or words describing the effect, are used; and that when the power is executed the interest created by it is an actual lease, or exchange, &c. we shall probably think that it is wholly immaterial which form is used. The point, however, has been the subject of much learned controversy (*d*).

It will here be proper to consider what is a *power*, and not an *interest*.

It is said, that where an estate is given absolutely, without any prior limited interest, to such uses as a person shall appoint, it would be an estate in fee (*e*). But this doctrine refers only to a devise, for in a conveyance such a limitation would merely confer a power on the party, and not give him an estate in fee.

Where there is an express estate for life given by will, with liberty to give the fee to particular persons, the devisee shall take for life, with a power to appoint the estate to the objects designated (*f*). But where an estate for life is not expressly given, but the estate is bequeathed generally to the devisee to such uses as he shall appoint at his will and pleasure; nevertheless, restraining the disposition to particular objects, it seems doubtful whether the devisee will take a fee simple conditional, or an estate in fee upon trust, or an estate for life with a power to dispose of the inheritance. This is

(*d*) See Butl. n. 1. to Co. Litt. 271 b; Powell's n. to Fearne's ex. dev. p. 379; and Preston's Tracts, p. 84.

(*e*) Whiskon *v.* Cleyton, 1 Leo. 156; Anon. 3 Leo. 71, pl. 108; Baldwin *v.* Pole, Ch. Trinity T. 8 Geo. III; and see 3 Ves. jun. 470; and see Hales *v.* Margerum, 3 Ves. jun. 229; Cook *v.* Duckenfield, 2 Atk. 565.

(*f*) Liefe *v.* Saltingstone, 1 Mod. 189; 1 Freem. 149, 163, 176; Cart. 232; Dighton *v.* Thomlinson, 1 Comy 194; 1 P. Wms. 149.

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the case of Daniel and Ubley, where the devise was, to "Agnes my wife to dispose at her will and pleasure, and to give to such of my sons she thinks best." According to Sir William Jones's report of this case (*g*), he and Crew, Chief Justice, thought that the wife had an estate for life, with a power to appoint the reversion, and if not, that she had a fee simple conditional, and if she conveyed contrary to the condition, the heir at law might enter for the condition broken (*h*): and Whitlock and Dodridge were of opinion that she had a fee simple upon trust. In Noy's reports (*i*) it is stated generally, that the wife had a power; and in Latch's report (which is best) (*k*) Whitlock and Jones are stated to have held, that the wife had an estate for life, with power to appoint the reversion; while Dodridge, who relied on the word *dispose*, was of opinion, that she had a fee simple conditional; and Crew, Chief Justice, agreed with him: but on a subsequent argument it seems that the Chief Justice came over to the opinion of Whitlock and Jones, and thought that the wife had only a power to appoint the reversion.

In a modern case (*l*) the devise was of the testator's "lands, tenements, and hereditaments, to his wife, to be divided and disposed of amongst his youngest children;" and it was determined by Sir Joseph Jekyll, that the word *disposed* related to the estate of the devisor, for that the lands could not be disposed of, but the estate, and consequently the wife, had a fee.

(*g*) 1 Jo. 137.
(*h*) See 49 E. 3, 16, pl. 10; Anon. Dall. 58, pl. 5; Doe *v.* Pearson, 6 East. 173.
(*i*) P. 80.
(*k*) P. 9, 39, 134.
(*l*) Anon. 2 Kel. C. C. 6.

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The better opinion, however, certainly is, that the devise is for life, with a *power* to appoint the inheritance, unless the words of the will clearly negative such a construction, and the authorities appear to be greatly in favour of that opinion. The most objectionable construction is, that the devisee takes a fee simple upon trust: for it must at this day be considered clear, that if the devisee be a married woman she cannot convey without a fine, as the law will not advert to the trust; and, in regard to its being an estate upon condition, we may observe, that what by the old law was deemed a devise *upon condition* would now perhaps, in almost every case, be construed a devise in fee upon trust (*m*), and by this construction, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by a suit in equity.

But suppose an estate to be given to A expressly for life, with remainder to such persons, &c. *generally* as he shall appoint, will the devisee in that case take a fee? In a case in the third volume of Leonard (*n*), the lands were devised "to the wife for life, and, after her decease, she to give the same to whom she will." It was determined that she took for life only, but with an authority to give the reversion to whom she pleased, for the express estate for life should not be enlarged by implication (*o*). In a case about ten years afterwards, reported in Leonard's first volume (*p*), the devise was to

(*m*) See 49 E. 3, 16, pl. 10.

(*n*) Anon. 3 Leo. 71, pl. 108; 4 Leo. 41, pl. 110.

(*o*) See Lord Parker's judgment in Tomlinson *v.* Dighton, 1 P. Wms. 171.

(*p*) Jennor *v.* Hardie, 1 Leo. 283.

the

the testator's wife Edyth during her widowhood, remainder to A in tail, and if A died without issue in the life of the wife, that then the land should *remain to her* to dispose thereof at her pleasure. A did die in her life time without issue, and it was determined, that the wife took a fee simple. The court relied much upon the words of the limitation of the remainder to the wife, *Quod integra remaneat dictæ Edythæ.*

In a modern case (*q*), the devise was, to the testator's *heir at law* for her life, and after her death to her lawful issue; and if she should have no issue, then that she should have power to dispose thereof at her will and pleasure. She died without issue. The whole court was clearly of opinion that she had an estate in fee simple by the will, as the contingent remainder to the issue never vested: that the testator by giving her power to dispose thereof at her will and pleasure, in case she had no issue, had given her a fee simple: but supposing the words did not carry the fee simple, yet, as she was heir at law, the fee descended to her upon the death of the testator, and, she having no issue, it was never out of her; and the Judges, therefore, held a will made by her during her coverture to be void. Against this opinion, the before-mentioned case in 3 Leon. was cited, but the court said that that case was not law, and that the case in 1 Leon. was determined after that in 3 Leon. In a very late case (*r*), where an estate for life only was given, with a power to dispose by *will* in a contingent event, the case of Goodtitle and Otway was not referred to,

(*q*) Goodtitle *v.* Otway, 2 Wils. 6.

(*r*) Reid *v.* Shergold, 10 Ves. jun. 370; and see Nannock *v.* Horton, 7 Ves. jun. 391, acc.; and Randal *v.* Hearle, 1 Anstr. 124.

but

but the case in 3 Leon. was relied on as an *authority*; and it was determined, that the devisee took for life only, with a power of disposition by will.

It remains for us to attempt to reconcile these cases; and it is conceived that the case in 3 Leonard must still be deemed a binding authority. As a general rule, it must be admitted, that the law does not incline to enlarge *express* estates by implication. But the case of Goodtitle and Otway, as well as the case in 1 Leonard, may well stand without subverting the authority of the case in 3 Leonard. The case in 1 Leonard seems to have been decided on the apparent intention of the testator, that in case of the death of A without issue, in the life of the wife, she should take the whole dominion. The estate for life was given merely on account of the remainder, and the words applied rather to an actual estate than to a power. In Goodtitle and Otway also, the estate for life was created only to introduce the remainder. Besides, in regard to this case, it may be observed, that if (which the court seemed to doubt) the words did not carry the fee simple, then it was no objection that the fee descended to the daughter, and was never out of her; for the fee descended charged with the power, and under that construction she had a general power of appointment, with remainder to herself in fee; and, as her will was void unless it operated as an execution of her power, it ought to have been deemed an exercise of it, according to the cases noticed in a subsequent part of this work. This case was certainly very distinguishable from that in 1 Leonard. The cases, however, may perhaps be thought to authorise the following conclusions.

1st. That where there is an express estate for life given,

given, with remainder generally as the devisee shall appoint, without any intervening estate to strangers, the devisee shall take for life only, with a power of disposition over the inheritance. The rule is more inflexible where a specific mode of exercising the power is pointed out. But,

2dly, Where the estate for life is given in order to let in estates to strangers, and no specific mode is required to the disposition of the inheritance, there, in the event of the mesne estates not taking effect, the devisee shall take the entire fee simple. These, however, cannot be treated as general rules applicable to every case. Wherever a *power* is clearly intended to be given, the devisee cannot be holden to take a fee. Had the devise, for instance, in Goodtitle *v.* Otway, in failure of issue, been "that the wife should have power to dispose thereof at her will and pleasure, *notwithstanding her coverture*," she would have taken a *power* merely, and not the fee simple.

We are now to consider in what cases executors take a fee simple upon trust to sell, under a will, or are invested merely with a power of disposition. As far back as the reign of Henry the Sixth, it was laid down in a case in the year books, that if one devise that his executors shall sell his lands, and die seised, his heir is in by descent, and, consequently, the executors have only a power; but that if one devise his land to his executors, there the freehold passes to them by the devise (*s*). The same distinction is again taken in the same book. It is

(*s*) 9 H. 6. 24, b. 25 a.

said, that if I devise that certain lands shall be sold by my executors, although my heir is in by descent, and his heir after him, yet the executors may enter upon the heir by descent, by reason of the will (*t*). This distinction, namely, between a devise of lands *to executors to sell*, and a devise that *executors shall sell the land*, is mentioned by Justice Doderidge as a common difference (*u*). So Littleton (*w*) puts the case of a man devising that his executors may sell his estate, which he treats as a mere power passing no interest: and therewith Sir Edward Coke in his comment agrees. But, he says, that if a man deviseth lands to his executors to be sold, there the estate passes. In a subsequent folio (*x*) he takes precisely the same distinction, viz. between a devise that *executors shall sell the land*, and a devise *of the land to his executors to be sold*: and in the case of Houell and Barnes, where the testator *ordered the land to be sold by his executors*; Jones, Berkeley, and Croke resolved, that the executors had not any interest by this devise, but only an authority (*y*). So in the modern case of Yates *v.* Compton (z), a devise that the executors should sell the land was treated as giving them a power only. Against this weight of *authority* there is merely an *obiter dictum* of Sir Matthew Hale's when Chief Baron, that it had been held, that if a man devises that his lands shall be sold by his executors for payment of his debts, that will give the executors an interest as well as if he had devised his lands to his executors to be sold (*a*). But he did not refer to the case

(*t*) 9 H. 6, 13 b.
(*u*) Latch 43.
(*w*) S. 169.
(*x*) 181 b.
(*y*) Cro. Car. 382.
(z) 2 P. Wms. 308.
(*a*) Barrington *v.* the Attorney-General, Hard. 419.

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in which this point was decided. The case, however, was not only in opposition to former opinions, but has been completely over-ruled by the later cases of Houell and Barnes, and Yates and Compton.

Thus far the distinction is intelligible and reasonable. A devise of the land to executors to sell, passes the interest in it, but a devise that executors shall sell the land, or that lands shall be sold by the executors, gives them but a power.

Littleton, in his 383 section, gives an exact copy of a case from the book of the assizes *(b)*; where it is stated, that the ancestor of the Plaintiff devised his lands to be sold by the defendant who was his executor, and, as he had not sold, it was held that the heir should recover by reason of the breach of the condition. Upon this case Coke observes, that it appeareth that when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold, and the reason is, *because he deviseth the tenements*, whereby he breaks the descent.

Mr. Hargrave, addressing himself to the case of a devise that *executors shall sell the lands*, observes (*c*), that as to the power's not surviving for want of an interest, Lord Coke concedes that if one *devises lands to be sold by his executors*, an *interest* will pass. Now such a devise so resembles devising that executors shall sell the land, as to give the distinction made between them the appearance of too curious and overstrained a refinement, such as rather consists in the formal arrangement of words than of any thing substantial: and he refers to the above-mentioned case cited by Lord Hale, as a judg-

(*b*) 38 E. 3 pl. 3. (*c*) Note (2) Co. Litt. 113 a.

ment against this distinction. But he admits that the cases of Houell and Barnes, and Yates and Compton, are the other way. This learned writer, however, is for construing a devise that executors shall sell the land, as well as a devise of lands to be sold by executors, as investing them with the fee simple, and not merely a power.

But from the cases which have been stated, it should seem, that a devise that *the executors shall sell the land,* or that *land shall be sold by the executors,* will give them simply an authority. The only question then is, whether a devise *of the land to be sold by his executors,* will operate as a devise of the estate to the executors. But according to the observation on the other side of the question, a distinction of this nature would be too curious and refined; and, therefore, assuming the first point to be clear, it would seem to follow, that these words would confer a power only on the executors; and this appears clear also upon the authorities. In the case cited by Littleton it was taken for granted that the estate passed to the executors; and the reporter appears to have thought it necessary to state only the *effect,* and not the *words* of the devise: and Coke cites no other authority for his opinion. Lord Nottingham, in his note to this passage in Littleton *(c),* states the statute of 21 Hen. VIII. which applied only to cases where *lands are willed to be sold by executors,* and it was considered, in strictness, as embracing powers only: and he cites the 49 Ed. III. 17. "The case was: A woman seised of lands in London *devised them to be sold by her executors,* and died without heir; that devise prevented the escheat

(c) 236 a.

which

which the king pretended to have, and the executors could enter and sell; therefore more than a bare authority passed. Yet in 1651, on evidence at the bar between Wilkinson and White, this case was started, and Lord Chief Justice Rolls doubted of this opinion, because, he said, it was only a descent according to the words of Littleton, and that it appeared to him, that *where lands are devised to be sold by executors,* there no interest passes, as in the last clause here."

In the case cited by Lord Nottingham from the year books, it appears, that no judgment was given; and, indeed, it is quite clear, that at this day the devise in that case would be held to give a power only. The devise was (after an estate tail) of the lands to be sold by the executors, or the executors of the executors, if all the executors should die, and four parishioners of the parish in which the land lay.

Upon the whole, therefore, as well by reason of the analogy of this case to that of a devise that the executors shall sell the land, or that the land shall be sold by the executors, as upon the authorities, there seems great reason to contend, that even a devise *of land to be sold by his executors,* without words giving the estate to them, must be deemed to invest them with a power only, and not to give them an interest.

Technical words are so essential to the creation of estates by *deed,* and their import is so generally understood, that a question rarely arises upon a *deed,* whether a party take an actual estate or only a power. In the case of Keene *v.* Deardon (*d*), it appeared, that estates were conveyed to the use of trustees, and

(*d*) 8 East. 248.

their heirs in trust, with the consent of the parties interested, to sell the inheritance in fee, and apply the money upon trusts; but it was provided, that until the inheritance should be sold, the rents should be received by the persons who would have been entitled thereto if the deed had not been executed. It was determined, that the trustees took the legal fee, but the counsel entered into an argument of some length, to shew that they took a *power* only—a doctrine utterly subversive of all received notions on this branch of the law of real property. The proviso as to the receipt of the rents and profits is similar to that inserted in mortgages, that the mortgagor shall receive the rents until default is made in payment of the mortgage money; which clearly, at most, makes him but tenant at will. The proviso, in truth, operates as a declaration of trust, and every *cestui que trust* in possession, is as tenant at will to his trustee. But even if such a proviso were, in defiance of all principle, admitted to have any *legal* operation, yet upon what ground could it be argued, that this proviso would convert the prior legal estate of inheritance, created with proper technical words, into a mere power. It were surely more consistent to say, that the persons named in the proviso would have a *power* of entry till sale, or default in payment, &c. However, it is quite clear that provisos like these have no other than an equitable operation. In the case of Keene and Deardon, the estate appears to have been limited to the trustees in fee, under a power operating by force of the statute of uses, and, if so, it escaped observation, that the trustees of necessity took the legal estate, and that any subsequent declaration or power could only take effect in equity *(d)*.

(*d*) *Vide infra.*

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By our law one man may create an unalienable personal trust in favour of another, for his support and maintenance. This species of trust is generally created in favour of married women; the object being to provide them with a separate maintenance, which neither they nor their husbands can alien. But where a married woman has property settled to her separate use, without any restraint on alienation, she is in equity deemed a feme sole, and may dispose of it accordingly (*e*).

It may not, perhaps, be wholly irrelevant to our subject, to touch slightly on the distinctions between what is an unalienable personal trust, and what is a power of disposition.

And first, a gift simply to the separate use of a feme covert is tantamount to a gift to such uses as she shall appoint by deed or will (*f*); although Lord Rosslyn

(*e*) Bell *v.* Hyde, Prec. Cha. 328; Grigby *v.* Cox, 1 Ves. 517; Davison *v.* Gardner, Treat. Purch. p. 393; Hulme *v.* Tenant, 1 Bro. C. C. 16.

(*f*) Peacock *v.* Monk, 2 Ves. 190; Fettiplace *v.* Gorges, 3 Bro. C.C. 8, 1 Ves. Jun. 46; Rich *v.* Cockell, 9 Ves. Jun. 319; Wagstaff *v.* Smith, ib. 520; Burnaby *v.* Griffin (1), 3 Ves. Jun. 266; and see 8 Ves. Jun. 176; 11 Ves. Jun. 222.

(1) The question in this case arose upon the validity of an equitable recovery, where the tenant to the precipe was made by the married woman. Lord Rosslyn held it good, and expressed his marked disapprobation of the objections taken to the title. His decision, however, in Mores *v.* Huish, although universally considered by the profession as an unsound judgment, has not been since *expressly* over-ruled; and therefore no title is at present considered as marketable upon which this objection occurs.

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in one case (*g*) considered, that an absolute power *to appoint* was essential where the trust was to pay from time to time. This, however, proceeded from the particular circumstances of the case, and his disinclination to support alienations by married women of their separate property: his decisions, latterly, on this point, were in direct opposition to the doctrine laid down by Lord Hardwicke and Lord Thurlow, and have been since frequently shaken by Lord Eldon (*h*).

The mere circumstance of the interest being directed to be paid from time to time, will not prevent the wife making a sweeping appointment at once (*i*). Where it is intended that the wife shall not dispose of the interest, it is now usual to insert an express clause, that she shall not sell, mortgage, charge, or otherwise dispose of the same in the way of anticipation.

But although these words, or words of the like nature, are omitted, yet if the instrument point to a personal enjoyment, the fund cannot be alienated; as where in a deed of *separation*, a trust was created to permit a person to receive the dividends of stock, for the maintenance and support of the wife, it was deter-

(*g*) Mores *v.* Huish, 5 Ves. Jun. 692. See Newman *v.* Whistler, 4 Ves. Jun. 129.

(*h*) Sperling *v.* Rochfort, 8 Ves. Jun. 164; Parkes *v.* White, 11 Ves. Jun. 209.

(*i*) Clarke *v.* Pistor, 3 Bro. C. C. 346 n; Ellis *v.* Atkinson, 3 Bro. C. C. 565, 2 Dick. 759; Pybus *v.* Smith, 3 Bro. C. C. 340, 1 Ves. Jun. 189; Witts *v.* Dawkins, 12 Ves. Jun. 501; and see Sperling *v.* Rochfort, 8 Ves. Jun. 164; Parkes *v.* White, 11 Ves. Jun. 209. Note, Sockett *v.* Wray, 4 Bro. C. C. 483, depended on Lord Alvanley's opinion, that the power in that case could only be exercised *by will*; but see Sperling *v.* Rochfort, *ubi sup.*

mined

mined that she had no dominion over it, but that it was subject to the special trust for her maintenance and support, although the trustee covenanted to indemnify the husband against the wife's debts (*k*). So in Hovey *v.* Blakeman (*l*), where the trust was to pay the rents and interests in equal divisions into the respective proper hands of the testator's two sisters, as long as they should live, the same to be to their separate use; the Master of the Rolls thought, that an absolute property was not intended to be given to them, so as to give a power of disposition; that it was a personal bequest to them to be paid into their proper hands, and without a power of disposition; and he dismissed the petition of an annuitant, under a grant from one of them, leaving him to file a bill, but intimating an opinion against it. But as we have seen a simple gift to the separate use of a feme covert, gives her the absolute disposition of it. And in the late case (*m*) of Wagstaff *v.* Smith, where the trust was to permit the wife to take or receive the dividends to her own use, during her life, independently of her husband; the Master of the Rolls held, that as to this property she was to be deemed a feme sole. There were, he observed, no words of controul, no words of restriction. The trustees were not even to pay from time to time into her hands upon her receipt, but she was to receive. Here were the very words to give the absolute property. If land had been given to trustees in these terms, it would

(*k*) Hyde *v.* Price, 3 Ves. Jun. 437.

(*l*) 9 Ves. Jun. 524, cited.

(*m*) Wagstaff *v.* Smith, 9 Ves. Jun. 520.

have

have been an use executed, and the party would have the legal estate (*n*).

The distinctions taken in the cases on this head appear extremely refined and subtle, and it is almost impossible for a practitioner to advise confidently on any case where the very words have not received a judicial determination. It is probable, however, that had the case of Hovey and Blakeman come on again, it would have been decided that the wife had a power of disposition. There is no inconvenience in this doctrine, as express words of restriction are now universally used, where it is intended that the wife shall not have the absolute dominion. Where these words are omitted, it were perhaps better to hold that the wife may alien the property (*o*).

In some cases, where a married woman having an absolute power of appointment over a fund has executed it, a bill has been filed, in order that the wife might consent in court to her disposition; and this practice occasioned a doubt, whether it was not necessary that the wife's consent in court should be taken (*p*). But unquestionably the appointment is valid without any consent, and so it is considered in practice: appointments are daily made to purchasers, unattended by any other solemnities than those required by the power.

It remains to observe, that no particular solemnities are by law required to the execution of powers. It

(*n*) And see Jones *v.* Harris, 9 Ves. Jun. 486; Parkes *v.* White. 11 Ves. Jun. 209.

(*o*) See Lord Alvanley's judgment in Hesse *v.* Stevenson, 3 Bos. & Pull.

(*p*) See 8 Ves. Jun. 181, 182.

rests

rests in the breast of the person creating a power, to impose such ceremonies as he thinks proper. A power *may* be reserved to be executed by a simple note in writing (*q*), or by *will* unattested, or attested by only one or two witnesses, and this although the subject over which it rides, is *real* estate. This point has been considered as decided by Lord Chancellor Jefferys, in the case of Dey and Thwaites, which was afterwards approved of by Mr. Baron Powell (*r*). Lord Hardwicke appears clearly to have entertained the same opinion (*s*). In Goodill *v.* Brigham (*t*), however, Mr. Justice Buller seems to have taken it for granted, that such a power could not be reserved; but this was a mere *obiter dictum*. Lord Hardwicke's opinion is full and clear, that the statute of frauds is entirely out of the question, except so far as it is the rule which the donee is directed to follow in the execution of the power. The will, he said, operates by appointment, though the party may arbitrarily insert the rules prescribed by the statute (*u*).

A distinction has, indeed, been taken by a late writer, between a will *nominatim*, and a *writing purporting to be a will*. Without referring to any authority, the first is treated as doubtful; but in the last case it is said to be well established, that it may be reserved to be executed without the formalities imposed by the statute of frauds (*x*). It is apprehended that no authority can be adduced in support of this distinction. To shew that it is unfounded, it may be sufficient to

(*q*) *Vide infra.* ch. 5. sect. 2.
(*r*) See 3 Cha. Ca. 69.
(*s*) Wilkes *v.* Holmes, 9 Mod. 485.
(*t*) 1 Bos. and Pull. 193.
(*u*) See 9 Mod. 485, 486.
(*x*) Rob. on stat. of frauds, 332.

observe,

observe, that Lord Macclesfield decided, on very solid grounds, that the words "any writing in the nature of a will," mean the same as a will (*y*). It seems clear, however, that in both cases the reservation is valid.

But of course a man cannot reserve such a power to *himself* by his own *will* (*z*), as that would be simply an evasion of the statute of frauds.

(*y*) Longford *v.* Eyre, 1 P. Wms. 740.

(*z*) Habergham *v.* Vincent, 2 Ves. Jun. 204.

SECT.

SECTION II.

OF THE INSTRUMENTS BY WHICH POWERS MAY BE CREATED.

A POWER of appointment or revocation may be reserved either in the body of the deed, or by indorsement, before the execution of it (*a*), or by a deed of even date with the settlement; and there need not be any counterpart of the deed (*b*). And although the power be interlined, yet it will be good, in the absence of evidence to shew, that the interlineation was made after the execution.

We are never to lose sight of the *origin* of powers. And here we must recur to the distinction taken in a previous page, between conveyances operating by transmutation of possession and conveyances which have not that operation.

For as to the latter, one of those assurances, namely, a bargain and sale, can only be sustained by a *valuable* consideration, and a power in such a conveyance to lease to any man, although for a valuable consideration to be paid or rendered, is too general, and therefore void. Equity, before the statute of uses, would not sanction so indefinite an executory agreement; and therefore the statute could never attach on the estates attempted to be created under such a contract. To

(*a*) Griffin *v.* Stanhope, Cro. Jac. 456. See Outon *v.* Weeks, 2 Keb. 809.

(*b*) Fitz *v.* Smalbrook, 1 Keb. 134; and see 3 Cha. Ca. 83, 119.

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the validity of the other of those assurances, viz. a covenant to stand seised, a *good* consideration is essential, and a proviso to lease to any one, is for the same reason also void; nor is it any argument in favour of a lease under such a power, that it is granted to some person within the consideration of blood (*c*); because by reason of its generality, the power was void at the time the deed was executed.

But it seems clear that a power may be reserved in a bargain and sale, to grant a lease to a person from or on behalf of whom a valuable consideration moved at the execution of the deed (*d*). So a power may be reserved in a covenant to stand seised, to grant a lease to a person named in the deed, and within the consideration of blood or marriage, although such a lease cannot be granted where a *general* power is reserved to lease to any man (*e*).

Mr. Cruise has observed in his valuable Digest, that the usual powers of leasing given in modern settlements may be valid, though inserted in a bargain and sale, or covenant to stand seised, as it is always required that the best and most improved rent should be reserved, and a lessee is a purchaser for a valuable considera-

(*c*) Mildmay's case, 1 Rep. 175, Mo. 144, S.C cited Goulds. 173, pl. 106. nom. Sharrington's case; and see Mo. 373; Cross *v.* Faustenditch, Cro. Jac. 180. S. C. 2 Ro. Abr. 260. (A) pl. 1; Dorothy Chute's case, 1 Lev. 30. S. C. 1 Keb. 34, nom. Lady Dacre *v.* Hazel; Prince *v.* Green, cited 1 Cha. Ca. 161, 3 Cha. Ca 91; Baynes *v.* Belson, Raym. 247; Pine *v.* Pine, 2 Keb. 809; and see Cary, p. 22; Goodtitle *v.* Pettoe, Fitzg. 299.

(*d*) See and consider Parsons *v.* Mills, 2 Ro. Abr. 786 (M), Mo. 547.

(*e*) Mildmay's case, 1 Rep. 175; Goodtitle *v.* Pettoe, Fitzg. 299, 2 Barn. 10, 90, 142, 2 Str. 934. See a *dictum* by Lord Chief Justice Raymond, *infra*.

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tion (*f*). Now it is certainly clear, that a reservation of rent, even a pepper-corn, is a sufficient consideration to support a bargain and sale. But this does not altogether remove the difficulty. In a covenant to stand seised, it might be a question whether a lease for any other consideration than that of blood or marriage, would be valid. And upon both assurances the question still remains, whether the generality of the power does not render it void, and whether the consideration ought not to move from the lessee, or become a debt due from him at the time of the execution of the deed creating the power; or at least, whether the consideration ought not to be ascertained and fixed in the deed, although it should not be made obligatory on him to accept a lease. The affirmative would seem to follow from the decided cases; and Lord Chief Baron Gilbert has observed, "that no use can arise in this case; for where *the persons are altogether uncertain, and the terms unknown,* there can be no *consideration,* and for which reason the former estates raised upon good consideration, cannot by such lessees be defeated." (*g*) If such leases were to be supported, it might on the same ground be argued, that contingent uses to persons not *in esse* could be raised on a bargain and sale, provided they paid a consideration when born. Besides, powers could not, under any construction, be reserved on a bargain and sale to any but the bargainor, as the consideration must be paid to *him,* in order to raise the use.

It is clear, however, that a general power of *revocation* may be reserved either on a bargain and sale,

(*f*) 4 Cruise's Dig. 322. (*g*) Gilb. Uses, 46.

or a covenant to stand seised (*h*); and in Goodtitle *v.* Pettoe (*i*), Lord Chief Justice Raymond expressed an opinion, that a power might be given in a covenant to stand seised, to appoint the use in favour of *any* of the covenantor's relations, *in consideration to continue the estate in the family of the covenantor;* and that it might be averred after the appointment, that he to whom the use was appointed was of the blood of the covenantor. As a general power of appointment is tantamount only to an estate in fee, it might perhaps originally have been holden with perfect consistency, that upon a bargain and sale, or covenant to stand seised, such a power might be given to any one to whom a fee might be limited. But in Goodtitle *v.* Pettoe, it was solemnly decided, that such a general power in a covenant to stand seised, was void in its creation, although an estate in fee might have been given by the deed creating it, to the donee of the power (*k*); and that an appointment could not be made even to one of the *covenantor's* blood, according to the rule in Mildmay's case (*l*). And in the prior case of Warwick *v.* Garrard (*m*), it was determined, first at law and afterwards in equity, that such a power reserved even to the covenantor himself, was void (1).

Thus

(*h*) Co. Litt. 237 a; Shep. Touch. 524, 525.
(*i*) Fitzg. 299.
(*k*) Goodtitle *v.* Pettoe, Fitzg. 299; 2 Barn. 10, 90, 142; 2 Str. 934.
(*l*) *Vide supra.*
(*m*) 2 Vern. 7.

(1) The reporter ends this case with a *quære tamen.* The grounds of the decision do not appear upon the register's book; but the mere point

Thus much for conveyances *not* operating by transmutation of possession. *Powers* may of course be limited in every conveyance which operates by transmutation of possession. The estates created by force of them, arise out of the seisin of the releasees, feoffees, conusees, or recoverors. Now we have seen that before the statute of uses, the legal estate remained vested in the releasees, &c. who were bound in equity to execute the estates created, although they were not supported by a valid consideration. By this rule, therefore, a person taking under the execution of a power, raised by a conveyance operating by transmutation of possession, acquires an equitable estate, or an use; and by force of the statute, the legal estate itself is instantaneously transferred to him, without reference to any consideration.

We have seen that a power of revocation could not be reserved on a lease at common law. It has been said, that if a feoffment, or lease and release, be made to J. S. and his heirs, *to the use* of J. S. and his heirs, with a power of revocation reserved thereupon, such a power is void; because J. S. is in by the common law. And upon the same ground, the same writer doubts, whether upon a conveyance to a purchaser and his heirs, to such uses as he shall appoint; and in default of, and subject to such appointment, to *the use* of the purchaser and his heirs, such a power can be exercised, for,

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point must have been tried at law, as the necessary directions were given by the decree for that purpose. Reg. Lib. 1685, B. fol. 840, Warwick *v.* Garrard.

subject to the power, the purchaser is in by the *common law*, and the reservation of the power *before* the limitation to the purchaser, cannot make any difference (*n*). The authority for this point is an observation by Sir Edward Coke, in the few remarks he has made on uses, that in case of a feoffment, or other conveyance, whereby the feoffee or grantee, &c. is in by the common law, such a proviso were merely repugnant and void (*o*). And a passage in Shepherd's Touchstone (*p*), where the author referring to Co. Litt. says, "But in case of a feoffment, or other conveyance, whereby the feoffee or grantee is in by the common law, as where A doth infeoff B and his heirs *to the use* of B and his heirs, *it is said* such a proviso is merely repugnant and void." It should seem, however, that Coke had not any such case in contemplation. He appears to have alluded to a feoffment at common law, to the feoffee at once, *and not by way of use.*

To consider this point accurately, we should enquire, 1st, Whether the releasee *is* in by the common law; and, 2dly, Whether, independently of that objection, the power is merged in the fee. The last objection has been thoroughly discussed in the preceding chapter; and as to the first, although the statute requires that *one* person should be seised to the use of *another*, yet there are several cases in which it vests the use in the very person in whom the seisin is vested: *intention*, in this respect, appears always to have been attended to. Thus, nine years after the statute of uses, it was holden, that if a man make a feoffment in fee to

(*n*) 1 Sanders on Uses, p. 157, and note *il*.

(*o*) Co. Litt. 237 a.

(*p*) P. 525.

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the use of himself for life, and that after his decease J. N. shall take the profits," that shall create an use in J. N.; otherwise, if it had been said, that "after his death the feoffees should *receive* the profits, and *pay* them over to J. N." because J. N. would not receive them but through the hands of the feoffees (*q*). So in a case in Moore, in 5 Elizabeth, it was laid down as clear, that if a feoffment was made to J. S. to the use of him, and that he should be seised to the use of R. H. that was void as to R. H. because that the use and possession was before in J. S. (*r*) And in Sammes's case, this construction was adopted, and the reason of it was stated to be, that the statute of uses had been always beneficially expounded to satisfy the intention of the parties (*s*). It seems also very lately to have been thought, that even where the estate is not limited unto and to the use of the releasees, yet if none of the limitations of the settlement could possibly take effect, without giving the legal estate to the trustees, the settlement must be so construed; and this, it is said, was done in a case in the House of Lords (*t*). From these observations, it seems to follow, that in the case under consideration, in order to preserve the power, and to effectuate the intention of the parties, the releasee would be deemed to be in under the statute of uses. And they also shew that there is no weight in an objection that is sometimes made, viz. that where it is intended a purchaser shall only take a trust estate, the release ought

(*q*) 36 H. 8; Bro. Feffements al Uses, 340, pl. 52; and see Symson *v.* Turner, 1 Eq. Ca. Abr. 383 n.

(*r*) Mo. 45, pl. 138.

(*s*) 13 Rep. 56.

(*t*) See Doe *v.* Martin, 4 Term Rep. 39.

to be to A to the use of B, in trust for C the purchaser (*u*), on the ground that a limitation unto and to the use of A, in trust for B the purchaser, would give B the legal estate, as A would be in at the common law, and the statute would operate on the trust limited to B. Every day's practice, however, evinces the opinion of the profession on this point. In numberless conveyances, estates have been limited unto and to the use of the releasees, in order to vest the legal estate in them. This point, indeed, is so clear, that in Doe *v.* Martin (*w*), where it was insisted that the legal estate was vested in the releasees of a settlement, Lord Kenyon said, that in answer to that, it was sufficient to observe, that it was limited to the trustees, without saying "to and *to the use* of the trustees," Indeed, it is apprehended that no one would in practice venture to contend that any limitation could be executed by the statute, after a limitation unto and *to the use* of the releasee in fee. Even if the objection were well founded, yet it would not be necessary to convey to A, to the use of B, in trust for C; but the estate might be conveyed to C, (the intended *cestui que trust*), as the releasee, to the use of B the trustee, in trust for C himself.

In the opening of the work it was observed, that a power given by a will was a common law authority. But here we must consider whether a devise to uses through the medium of a devisee, as a devise to A and his heirs, to the use of B and his heirs, will not take

(*u*) Watk. Prin. Conv. 72 n. (*w*) 4 Term Rep. 39.

effect

effect under the statute of uses. Upon this point a difference of opinion has been expressed (*x*); and, indeed, the subject is exhausted by the learning which has been displayed upon it (1). It must be admitted to be quite clear, that an immediate devise to A for life, remainder to B in fee, would be good, although no seisin was raised to serve those estates; or, in other words, lands may be devised without the aid of the statute of uses, and it is not material that the limitations are termed *uses*. On the other hand, it seems equally clear, that where a seisin is raised by will to feed uses created by it, such uses will be executed into estates by the statute of uses.

(*x*) Butl. n. to Co. Litt. 271, b. III. s. 5; Powell on Devises, 272; and see 1 Sand. on Uses, 195; and Fonbl. n. (e) to 2 Treat. Eq. p. 24, 2d edit.

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(1) Mr. Booth, it is said, wrote the following postscript to an opinion: "Powers under wills are not like powers under conveyances, operating by way of use. The execution of a power under a devise is not the limitation of a use; no, not where the devise is to uses: as where there is a devise to J. S. and his heirs, to the use of A for life, remainder to B intail, with power for A to limit a jointure, or lease, or charge, there will be no seisin in J. S. consequently no such use in A or B, as is executed by the statute of uses; consequently the execution of the power is no use; it operates as a devise under the statute of wills." But in another opinion of Mr. Booth's, the authenticity of which is equally well known, he says, speaking of a power of exchange, under a will to a tenant for life, that "when he (the tenant for life) executes his power of exchanging, he is the declarer of the use, and a fee passes *out of the estate of the persons who are the devisees to the uses in the will:* for it has been resolved, that a devise to an use may be as well as a feoffment to an use; and the uses under such devises will have the same operation as uses under feoffments."

In support of the contrary opinion, it is insisted that the statute of uses cannot refer to the statute of wills, which was not then in contemplation. It is said to be difficult to conceive how uses created under the testamentary power given by the statute of wills, can be within the statute of uses; and that it may be argued that a statute can *never* be considered as relating to any thing which did not exist at the time of its passing. But this is well answered by my Lord Chief Justice Coke, who in Vernon's case (*y*), addressing himself to the precise objection, said, it is frequent in our books, that an act made of late time should be taken within the equity of an act made long time before, of which he gives many instances (*z*). In the principal case, that part of the statute of uses which relates to jointures, was holden to be within the equity of the statute of wills. It appears to have been thought in Andrewes's case in 18 Eliz. (*a*), that the statute of uses would operate on uses created by will; and in Popham and Bampfield, 34 Car. II. (*b*), and Burchett and Durdant, 2 W. and M. (*c*), the same point was admitted both at the bar and by the court. In the case of Hore and Dix, 12 Car. II. (*d*), it was resolved, that an use could not be raised without a deed. And as to the case of a devise of land to uses by a will in writing, which is not a deed, it was said, that that went upon another reason, *scil. rather upon* the statute of 32 H. VIII. of wills, *than upon* the statute of 27 H. VIII. of uses. This case has been treated as an authority, that the use is executed

(*y*) 4 Rep. 1.
(*z*) And see Williams *v.* Drewe; Willes, 392; Lane *v.* Cotton, 1 Com. 100.
(*a*) Mo. 107.
(*b*) 1 Vern. 79.
(*c*) 2 Ventr. 311.
(*d*) 1 Sid. 26, 4th resol.

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by the statute of wills, and not by the statute of uses; but, on the contrary, it appears to admit that the statutes may have a concurrent operation. It was in like manner admitted in Broughton and Langley, 2 Ann (*f*), that a devise of lands may be by express words to the use of another than the devisee, and that such devise will be executed by the statute of uses. It should seem, therefore, upon principle as well as authority, that the statute of uses *may* operate on uses created by will: and that where a seisin is created to serve the uses, the statute will in most cases transfer the possession to them. It is not denied, that a devise unto *and to the use* of one, will vest the legal estate in him, although ulterior uses are declared in favour of others; but this, perhaps, it may be said, is not by the operation of the statute of uses, but that it depends on an irresistible inference of the testator's intention, in analogy to the resolutions on limitations to uses in deeds.

It has been observed, that whether a devise to uses operates solely by the statute of wills, or by that statute jointly with the statute of uses is, *except in a very few cases,* a matter rather of speculation than of use; as it is now settled that an immediate devise to uses without a seisin to serve those uses is good; and that where the estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee, as appears to suit best with the intention of the testator. It is, however, indispensably necessary, that this point should be settled. Suppose an estate to be devised to A and his heirs, to the use of B and his heirs, and A die in the testator's life time, is the devise void?

(*f*) 2 Lord Raym. 873, 2 Salk. 679.

The

The solution of this question depends upon the previous one, viz. whether the devise do, or do not, operate under the statute of uses. If it do not, and the use should be considered as vested in B under the statute of wills, then the death of A would not defeat the devise. If it do operate under the statute of uses, then, in fact, the entire estate is given to A, and as the devise lapses by his death, there would be no seisin to serve the use limited to B, when it ought to arise by the death of the testator, and consequently it may be contended that the devise would be void. But although it seems clear that the statute in this case refers to the statute of wills, yet as every testator has a power either to raise uses by the joint operation of the statute of uses and the statute of wills, or by force of the statute of wills only, perhaps the courts would, in favour of the intention, construe the devise as a devise not affected by the statute of uses, but as giving the fee to B at once (*g*). This cannot, however, be considered a clear point. But even admitting that the devise is void at law, yet equity would compel the testator's heir at law to fulfil the intention, by conveying the estate to the same uses.

Nor is this the only case in which it is of real importance that this point should be understood. Till we ascertain whether or not a power in a will is a common law authority, or a power deriving its effect from the statute of uses, we cannot discover in whom, by virtue of an appointment under such power, the legal estate is vested. This will be explained in a subsequent chapter (*h*). To prevent these questions arising, estates

(*g*) See and consider Dobbins *v.* Bowman, 3 Atk. 408; and Cross *v.* Hudson, 3 Bro. C. C. 30.

(*h*) Chapter 5. *post.*

should

should be devised to the devisees at once, and not through the medium of a devisee to uses. Where the limitations in a will are numerous, a seisin to serve them is frequently created for the sake of brevity, as it saves the repetition of words of gift preceding every limitation; but the same purpose will be effectually answered by devising the estate "to the uses after expressed," without naming any devisee to the uses, and then going on in the usual way with the limitations. If it should be thought necessary, in any case, to raise a seisin to serve the uses, in order to attract the statute of uses, several devisees to the uses should be named, so that, in case of the death of any of them in the life time of the testator, the estate might survive to the others, which it would certainly do if the estate was given to them, as it of course ought to be, as joint tenants.

Before we close this head of our enquiry it should be observed, that a seisin must be raised commensurate with the estates authorized to be created under the power. If a life estate, for example, were conveyed to A to such uses as B should appoint, and B were to appoint to C in fee, this disposition could not take effect beyond the interest conveyed to A. And where it is intended that the estates to be created by the *execution* of the power shall be invested with the legal estate by force of the statute of uses, the land should be conveyed to the releasee, &c. to the uses intended to be appointed, and not to the releasee *to the use of himself* to the uses, as, in that case, any estate created under the power would be an use upon an use, and consequently would be void at law, although it would be supported as a trust in equity,

equity. Where the legal estate is vested in any person independently of the deed declaring the uses, as in the case of the recoveror in a recovery, or the conusee in a fine, it should for the same reason be declared, that the recoveror or conusee shall stand seised *to the uses*, and not that the recovery or fine shall enure *to the use of them*, to the uses. This, which is a clear point, was so laid down by Lord Hardwicke in the case of Lloyd *v.* Abrahall (*i*), where a fine was levied to two trustees; and it was declared, that it should enure *to the use of them their heirs and assigns*, to the uses; and Lord Hardwicke decided the case (which was argued by the most eminent counsel of the day) wholly on the ground that the legal estate was in the trustees. The case arose upon a devise *for want of issue of the testatrix's body*, to whom no estate was limited; and Lord Hardwicke supported the devise, which was otherwise void as too remote, because it was of trust estates; and he was of opinion, that if there had been issue living, who had brought a bill for a conveyance, the court would have decreed a strict settlement in order to effectuate the devises over. The estate is to this day enjoyed under this decision; but unless in a case where the trusts are executory, and not executed, such a decision would not now be made. A mere devise not pointing to a future settlement, must receive the same construction, whether the testator be seised of the legal, or only of the equitable estate; or whether he devise legal or equitable estates to the devisees intended to take beneficially.

Sometimes in a power to appoint a life estate it is ne-

(*i*) T. Term 27 and 28 Geo. II. MS.; and see Phelp *v.* Hay, MS.; and in Appendix.

cessary

cessary to authorize a limitation to trustees, to preserve contingent remainders in the instrument creating the power, of which the life estate is to take precedence. This should always be attended to. Where an estate is limited to trustees and their heirs generally, to preserve contingent remainders, and a general power of appointment is afterwards given, they will take the fee, because, under the power, contingent remainders might be created which would be liable to be defeated if the fee were not vested in the trustees. This question of course arises only in those cases where the court *can*, in favour of the intention, hold the trustees *not* to take the fee, although the estate is limited generally to them and their heirs, and is not confined to the life of the person taking the precedent estate of freehold (*k*).

(*k*) See Venables *v.* Morris, 7 Term Rep. 342, 438; Doe *v.* Hicks, ib. 433; Baker *v.* Anscombe, 1 New Rep. 25; Curtis *v.* Price, 12 Ves. jun. 89.

SECTION III.

OF THE OBJECTS FOR WHICH A POWER MAY BE CREATED.

We come now to consider the validity of a power with reference to its object.

And, first, a power may be reserved to revoke the whole settlement, or even any particular limitation in the settlement, leaving the other limitations unaffected (*l*). Where, however, a man has an estate to which powers are annexed, and it is intended to leave his estate undisturbed, but to reserve a power to revoke the powers given to him and all the subsequent estates, it should not simply be declared that all the limitations, &c. subsequent to his estate may be revoked, but it should be expressly provided that his powers may be revoked. For in a case where under a settlement A was made tenant for life, with powers of leasing, &c. and the settlement directed, that unless he settled another estate to the same uses, all the uses, &c. *subsequent* to his estate for life should cease; and he neglected to make the settlement; it was determined, that the estates created by A, under his powers, were not defeated, as there was no express declaration to that effect, so that the court considered the powers as benefits annexed to the estate for life, which were not intended to be defeated (*m*).

(*l*) Thomson *v.* Freston, 2 Ro. Abr. 262, (B) pl. 1; Anon. 1 Str. 584.

(*m*) Freke *v.* Lord Barrington, 3 Bro. C. C. 274.

So

So a power may be reserved to raise concurrent interests for different purposes, as powers to a tenant for life to grant a jointure to his wife, and to create a term, to commence from his death, for securing younger children's portions, in which case, during the continuance of the jointure, the term will not take effect in point of interest, but shall go on in time, and the residue of the term that remains unexpired after the death of the jointress, shall take effect in interest and no more (*n*).

Where the object of a power is to create a perpetuity, it will be considered simply void. This was decided in the great case of Spencer and the Duke of Marlborough (*o*), where, in a strict intail, under a will, a power was inserted authorizing trustees on the birth of each unborn tenant in tail, to revoke the uses limited to them, and to limit the estates to them for their lives, with remainder to their sons in tail. Lord Chancellor Northington held this power to be void, as tending to a perpetuity, and repugnant to the estate limited. And this decree was confirmed in the House of Lords, upon the unanimous opinion of the Judges, that such a power, whether in a deed or will, was void.

But a general power to appoint to children, grandchildren, or issue, without expressing the time within which they must be born is good, as the donee *may* appoint to such issue as are within the line of perpetuity (*p*).

(*n*) Edwards *v.* Slater, Hard. 410.

(*o*) Dom. Proc. 1763; 5 Bro. P. C. 592; see and consider Ware *v.* Polhill, 11 Ves. jun. 257.

(*p*) Routledge *v.* Dorril, 2 Ves. jun. 357.

SECTION IV.

OF THE EFFECT OF THE CREATION OF POWERS ON THE ESTATES LIMITED IN THE INSTRUMENTS CREATING THEM.

It remains only to consider the effect of the creation of a power on the estates limited in the instrument creating it: the effect of the *execution* of powers will form a subject of future enquiry.

Where a power of revocation is deemed void, as in the Duke of Marlborough's case noticed in the last section, of course the estates actually limited in the instrument creating the power, cannot be affected by the power, but will take effect in the same manner as if it had not been inserted in the instrument. And the law is the same in regard to estates given in default of any appointment under a power which is void in its creation. Therefore, if under a covenant to stand seised a general power of appointment be reserved, or given, to any person, and for want of such appointment, the estate be limited to some person within the consideration of blood or marriage, as the power would be void, the estate limited in default of appointment would take effect in possession (*q*).

It is obvious, that every power of appointment is, strictly speaking, a power of revocation to the extent of its operation; but still there is a striking distinction

(*q*) Warwick *v.* Garrard, 2 Vern. 7; Goodtitle *v.* Pettoe, Fitzg. 299.

between

between estates actually limited in a settlement with a power of revocation, and estates limited in default of the exercise of a preceding power of appointment. In the first case, the estates are vested subject to be revoked, or defeated, by the exercise of the power.

Whether, in the last case, the estates limited in default of appointment are, during the continuance of the power, contingent or vested, has been the subject of much discussion. The question arose in Leonard Lovie's case (*r*), and it was determined, that the estates limited in default of appointment were contingent (*s*). In Walpole *v.* Lord Conway (*t*) Lord Hardwicke held the same opinion. In Cunningham *v.* Moody (*u*) his lordship is supposed to have altered his opinion, and to have determined, that the power of appointment does not suspend the vesting of the subsequent remainders; and in Doe *v.* Martin (*w*), after a splendid argument, it was solemnly decided, that the estates limited in default of appointment were vested subject to be divested. The court relied on Cunningham *v.* Moody in opposition to Leonard Lovie's and Lord Conway's cases.

Mr. Fearne, who discusses these cases (*x*), enforces the authority of Doe and Martin, and between the case under consideration, and those upon limitations after a contingent limitation of the fee simple, takes this clear distinction, that in the latter the limitation is *originally* and *finally* contained *in* and made by the *conveyance itself*, while the former have no existence till the power

(*r*) 10 Rep. 78, see fo. 85 a.
(*s*) See 2 Ves. jun. 704, 5, 6.
(*t*) 3 Barnard. 153; see 4 Term Rep. 57 n; and see 2 Ves. jun. 709.
(*u*) 1 Ves. 174.
(*w*) 4 Term Rep. 39; and see Doe *v.* Weller, 7 Term Rep. 478.
(*x*) Cont. Remainders, 290—299, 4th edit.

is executed, so that, in truth, there is no estate limited until an appointment is made.

Lord Rosslyn, however, in a still later case (*y*), at first considered this doctrine very doubtful. He insisted, that in Cunningham *v.* Moody, it was not necessary to determine the point, and treated the case of Doe and Martin as a case of compassion. However, the point did not then call for a decision; and in pronouncing his decree he did not advert to it. In a subsequent case he treated it as clear, that the power did not prevent the estates vesting (*z*). Without considering whether it was absolutely necessary to decide the point in Cunningham and Moody, Lord Hardwicke's opinion is too clearly expressed to be misunderstood. He said, that the power of appointment did not make any alteration in the vesting of the remainder in fee; for the only effect thereof was, that the fee which was vested was thereby subject to be divested.

Besides these leading cases there are several *dicta* upon this point. In a case in Lord Raym. (*a*), Powell Justice, said, that if a fee simple be limited to such persons as A shall appoint by his will, remainder over, that is a good remainder *vested till* the appointment. In Goodill *v.* Brigham (*b*), Mr. Justice Buller put the very same case, namely, a power to A to appoint the fee, and in default of appointment to himself in fee, and held, that A could take nothing till his death, or till his appointment. But he must for the moment have forgotten the decision in Doe and Martin, which was decided eight years before, whilst he was a Judge of

(*y*) Smith *v.* Lord Camelford, 2 Ves. jun. 698.
(*z*) See 5 Ves. jun. 748.
(*a*) Vol. 2. 1150.
(*b*) 1 Bos. and Pull. 198.

the

the King's Bench, and in which he entirely concurred; and in a case which occurred about the same period as Goodill *v.* Brigham, he treated the fee as clearly vested till appointment, and referred to the case of Doe and Martin as an authority in that respect. Lord Thurlow (*c*), Lord Alvanley (*d*), Lord Redesdale (*e*), the present Master of the Rolls (*f*), and Lord Eldon (*g*), have all expressed themselves decidedly of the same opinion.

The result of the authorities, therefore, is, that the power of appointment does not prevent the vesting of the estates limited in default of appointment; and it is equally clear that the same doctrine applies to personalty; and that where the money is absolutely given over in default of appointment, it is vested, subject to be divested by the execution of the power (*h*).

Where a term is created by a settlement to raise portions, with a general power of revocation of the settlement, although the portions become actually due, yet, while the power subsists, it suspends and prevents the portions from being *payable*, because the donee of the power may revoke at any time before the portions are raised and paid, although the right to the portions is become vested under the terms of the settlement (*i*).

(*c*) Madoc *v.* Jackson, 2 Bro. C. C. 588; see 1 Rep. T. Redesdale, 293.
(*d*) See 4 Ves. jun. 636; Vanderzee *v.* Aclom, ib. 771.
(*e*) See 1 Rep. Temp. Redesdale, 293.
(*f*) See 7 Ves. jun. 583.
(*g*) See 10 Ves. jun. 265.
(*h*) Coleman *v.* Seymour, 1 Ves. 209; see 2 Ves. 208; Gordon *v.* Levi, Ambl. 364; Reade *v.* Reade, 5 Ves. jun. 748.
(*i*) Reresby *v.* Newland, 2 P. Wms. 93, affd. Dom. Proc. 2 Bro. P. C. 487.

CHAPTER III.

BY WHOM POWERS MAY BE EXECUTED.

SECTION I.

OF THE LEGAL CAPACITY OF THE DONEE.

To ascertain by whom a power may be executed, we must first enquire into the legal capacity of the claimant; and, secondly, we must examine the instrument creating the power, to see that he is duly authorized to perform the act. I propose, therefore, to consider, first, who is by law capable of executing a power; and, secondly, to state a few special cases which have arisen on the second head of enquiry.

And, first, every person who by the laws of England is capable of disposing of an estate actually vested in himself, may exercise a power over land, or, in other words, direct a conveyance of that land.

By the common law a married woman cannot dispose of her own estate without a fine or recovery; but, simply, as the instrument, or attorney of another, she may convey an estate in the same manner as her principal could, because the conveyance is considered as the deed of the principal and not of the attorney, and her interest is not affected.

When we consider that a power *not simply* collateral gives the complete dominion over the estate to the extent of

of the power, we may perhaps incline to think, that a married woman ought not to be permitted, in opposition to the rule of law, to divest herself of any estate or interest by the mere execution of a writing without a fine or recovery, although certainly there is no objection to her executing a power *simply* collateral. And that great lawyer Chief Justice Bridgman appears to have adopted this distinction (*k*). However, it has long been firmly settled, that a married woman may execute a power whether appendant, in gross, or *simply* collateral (*l*). Thus, if a married woman is tenant for life, with a power of leasing in possession, she cannot raise a mortgage term, for instance, without a fine or recovery; but by the mere execution of her power she may create a lease which will, at least in part, and may perhaps wholly, take effect out of her interest. So if she has a general power of appointment, with remainder, in default of appointment, to herself in fee, she cannot affect the remainder vested in her except by a fine or recovery; but she may defeat the remainder, and convey away the estate by the execution of her power.

It is not material whether the power is given to an unmarried woman, who afterwards marries (*m*); or to a wo-

(*k*) See 1 Cha. Ca. 18; 2 Freem. 168; and see Blithe's case, 2 Freem. 91; and Godolphin *v.* Godolphin, 1 Ves. 21.

(*l*) Harris *v.* Graham, 1 Ro. Abr. 329, pl. 12, 2 Ro. Abr. 247, pl. 6; Gibbons *v.* Moulton, Finch. 346; Daniel *v.* Uply, Latch. 39; Godb. 327, pl. 419; Bayley *v.* Warburton, 2 Com. 494; Tomlinson *v.* Dighton, 1 P. Wms. 149; Travel *v.* Travel, 3 Atk. 711, 2 Ves. 191, cited by Lord Hardwicke.

(*m*) Gibbons *v.* Moulton, Finch 346; Churchill *v.* Dibben, Reg. Lib. A. 1753, fol. 252.

man while she is married, who afterwards takes another husband (*n*): in both cases she may execute the power, and the concurrence of her husband is in no case essential. But, of course, a power given expressly to a woman "*being sole,*" cannot be executed by her during her coverture (*o*).

It must be remarked, that on the authority of the case of Rich *v.* Beaumount (*p*), it has been sometimes considered doubtful whether a power given to a feme sole was not suspended by her marriage. The case was: That in a settlement powers were given to a single woman to be executed by deed or will; she afterwards married; and during her coverture exercised the powers by will. Upon a bill filed by the appointee to establish the execution of the power, Lord King dismissed it, on the ground that the remedy lay at law; but upon appeal to the House of Lords the dismission was reversed, and the Court of Chancery was directed to state a case for the opinion of the Court of King's Bench, but it has never been ascertained what ultimately became of the case (*q*). The case, however, has frequently been cited as an authority that a feme covert may exercise such a power (*r*). In one case (*s*) Lord Hardwicke said, "It *has been determined* in this court, that a *feme covert* can execute a power *as in* Travel *v.* Travel, *and in* Rich

(*n*) Bayley *v.* Warburton, 2 Com. 494; Burnet *v.* Mann, 1 Ves. 157.

(*o*) Lord Antrim *v.* Duke of Buckingham, 1 Cha. Ca. 17, 2 Freem. 168. There is an imperfect note of this case in 1 Sid. 101.

(*p*) 3 Bro. P. C. 308.

(*q*) 4 Vin. Abr. 168, pl. 26; 22 Vin. Abr. 277, pl. 47; 3 Bro. P. C. 308.

(*r*) See 3 Atk. 711.

(*s*) See 2 Ves. 191.

v. Beaumont,

v. Beaumount, where the Lords sent a case to B. R. for their opinion, which they never did before:" and in another case, it is expressly stated, *arguendo* (*t*), that a case was sent from the Court of Chancery for the opinion of B. R., *where it was held a good appointment.* But, whatever was the decision in this case, the law is now clearly settled that a *feme covert* may execute a power given to her whilst sole.

In Peacock *v.* Monk, Lord Hardwicke doubted whether an heir at law of a woman would be bound by a mere agreement entered into before marriage between her and her husband, that she might dispose of her estate notwithstanding her coverture (*u*). But in Wright *v.* Englefield (*x*), Lord Northington held, that the wife might execute her power in the same manner as if she had a power over a legal estate; and his decree was affirmed in the House of Lords. In this case, indeed, the legal estate was, at the time of the articles, outstanding in trustees (*y*); but Lord Northington appears to have grounded his decision on the fact, that the execution of the power was in favour of children; and, therefore, there was a meritorious consideration. In a case which occurred a few months before (*z*), where the wife had the legal estate vested in herself, but had by articles a power to dispose of it, which she executed in favour of a natural son, and then joined with her husband in levying a fine to other uses; Lord Northington held the execution of the power to be void, and that the estate

(*t*) 2 Ves. 64; and see 1 Ves. 303, 305.

(*u*) 2 Ves. 191.

(*x*) Ambl. 468.

(*y*) Wright *v.* Lord Cadogan, 6 Bro. P. C. 156.

(*z*) Bramhall *v.* Hall, Ambl. 467; see Ambl. 474.

passed by the fine, and the court could not lend its aid, *because there was no meritorious consideration.*

Lord Northington, however, was not correct in holding a consideration to be necessary. The true principle on which equity ought to lend its aid is, that the agreement having been made on marriage, the husband would be compelled to make a legal settlement. Accordingly, in Rippon *v.* Dawding (*a*), Lord Camden held, that under an agreement entered into previously to marriage, a devise by a feme covert seised of the *legal* estate was valid, and he would not enter into the consideration of the objects in favour of whom the estate was devised. He said, it was a mistake to call it a question between volunteers. The agreement was made on marriage, and the wife might have compelled the husband to join with her in a fine, and he thought the case was governed by Wright *v.* Cadogan, although the legal estate was vested in the wife.

But where the agreement is, that the wife may dispose of the estate by will, a will made before the marriage, although subsequently to the agreement, will be revoked by the marriage, unless expressly authorized by the articles to be made *before* marriage (*b*).

An infant cannot, at common law, alien his estate, unless by force of a custom; but he, like a *feme covert*, may at common law do any act where he is a mere instrument, or conduit pipe, and his interest is not concerned (*c*). Upon the same principle it would seem to

(*a*) Ambl. 565, 1 Powell, Contr. 73; and see 2 Term Rep. 695.
(*b*) Hodsden *v.* Lloyd, 2 Bro. C. C. 534; Doe *v.* Staple, 2 Term Rep. 684; see particularly page 697.
(*c*) See 3 Atk. 710.

follow,

follow, that an infant may execute a power *simply* collateral, deriving its effect from the statute of uses.

And it has been thought that an infant may execute even powers appendant and in gross. The case of Hollingshead *v.* Hollingshead (*d*) is, as reported, an authority that way. An infant tenant for life, with a power to jointure upon his marriage, covenanted to settle lands on his wife, and afterwards died without having made any jointure, and equity made good the jointure, which, as the facts are stated, could only be on the principle that the infant had a disposing power. But the late Lord Alvanley seemed to think that the infant had done some act after he came of age to confirm the jointure (*e*): And in a case at the Rolls in the year 1738, the Master of the Rolls said, that the case of Hollingshead *v.* Hollingshead was an idle case, and not law (*f*) (1). In the great case of Hearle *v.* Greenbank (*g*), both the counsel and the court said repeatedly, that there was no case in which it had been decided that an infant could execute a power appendant or in gross. Lord Hardwicke said, that the applying for several private acts of parliament to enable infants to execute powers given to

(*d*) 2 P. Wms. 229, 1 Stra. 604, Gilb. Eq. Rep. 168; 4 Bro. C. C. 466, cited.

(*e*) See 4 Bro. C. C. 466.

(*f*) Colton *v.* Hoskins, Rolls, 21 March, 1738; 16 Vin. Abr. 486, pl. 3; and see Lord Kilmurray *v.* Dr. Grey, 2 P. Wms. 671 cited, explained in 3 Atk. 713.

(*g*) 3 Atk. 695, 1 Ves. 298.

(1) I have not been able to find any case on this point in Reg. Lib. The point probably arose incidentally in a case of Colton and Newland, which appears from the registrar's book to have been before the Master of the Rolls, in Hilary Term, 1738.

them,

them, shewed the sense of mankind in this respect; and he held decidedly, that a power to a feme covert, an infant, to appoint an estate, notwithstanding her coverture, did not authorize her to appoint the estate during her infancy, as it was a power to be exercised over her own inheritance. Lord Hardwicke, in this case, shewed not only that the power could not be legally executed during the donee's infancy, but that the testator did not intend that it should be, as he gave it expressly during coverture, but not during infancy, and *expressio unius est exclusio alterius*. From this it has been inferred, that Lord Hardwicke was of opinion that such a power might, by express words, be given during infancy; but it is manifest, that he merely intended to shew, that, even if such was the doctrine, it would not apply to the case before him. It would be a bold decision that an infant may have a power of disposition over an estate through the medium of the statute of uses. Before the statute, it is clear, that an infant could not alien an use limited to him, that is, could not direct his trustee to convey the estate to a third person. In that respect equity followed the law. Now the statute only operates upon what were uses at the time it passed. A power not *simply* collateral is a beneficial right to direct the trustee to convey the estate to whom you shall appoint. This direction an infant cannot give by reason of his non-age. Therefore, the appointee never gains an use, or equitable right, upon which the statute can operate. The law is already carried to its utmost limit in the power given to femes covert, and the disability of an infant is much stronger than that of a married woman.

Upon

Upon the whole it should seem, that an infant cannot exercise a power over *real estate*, unless it be a power *simply* collateral, but as to personalty, clearly he may exercise a power over that, at the age at which by law he may dispose of personalty to which he is absolutely entitled (*h*).

(*h*) Hearle *v.* Greenbank, *ubi sup.*

SECTION II.

OF THE WORDS OF THE INSTRUMENT CREATING THE POWER.

It is unnecessary to observe, that a power to be executed by the survivor of two persons, cannot be executed by the one first dying (*i*). Lord Thurlow has even decided that such a power cannot be executed by the two persons during their joint lives (*k*).

Formerly where a power was given to executors to sell, and one of them *refused* the trust, it was clear that the others could not sell. But the statute of 21 Hen. VIII. c. 4, provided, that where lands are willed to be sold by executors, and part of them refuse to be executors, and to accept the administration of the will, all sales by the executors that accept such administration, shall be as valid as if *all* the executors had joined. But although one refuse, the others, it is said, cannot sell to him, because he is still party and privy to the will (*l*).

It is regularly true, at common law, that a naked authority given to several cannot survive. Therefore, if a man devise his lands to A for life, and that after his decease the estate shall be sold by the executors, naming them, as by B and C his executors, or by B and C who are not named executors, in that case, if one of them die during the life of A, the other cannot sell, because

(*i*) Bishop of Oxon *v.* Leighton, 2 Vern. 376.

(*k*) Mac Adam *v.* Logan, 3 Bro. C. C. 320.

(*l*) Co. Litt. 113 a.

the

the words of the testator would not be satisfied (*m*). The same doctrine seems to apply to powers operating under the statute of uses, for in a case where *cestui que use* in fee before the statute of uses, willed that his feoffees A, B, and C, should suffer his wife to take the profits for her life; and that, after her decease, the premises should be sold by his said feoffees. One of the feoffees died, and then the wife died, and the question was, whether the survivors could sell, and it was ruled that they could not (*n*).

But where the words of the testator can be satisfied, a court of law will relax this rule. Therefore, if three or more executors are appointed, and the devise is, that the estate shall be sold by the executors generally, there the survivors may sell, because the plural number of executors remains (*o*). And this was decided in a case where a man appointed that his sons in law generally should sell the land, and before the time of sale arrived one of them died, and it was adjudged that the sale by the survivors was good, because they were named generally by his sons in law; and the words of the will in a benign interpretation were satisfied in the plural number, although they had but a bare authority; but if they had been particularly named, then the survivors could not have sold (*p*).

In a case in Dyer (*q*), where two executors were appointed,

(*m*) Co. Litt. 113 a; see Mo. 61, pl. 172; and see Wilm. 49; and Peyton *v.* Bury, 2 P. Wms. 626.

(*n*) Dy. 177, pl. 32; and see Stile *v.* Tomson, Dy. 210.

(*o*) Co. Litt. 113 a; see Dy. 177, pl. 32.

(*p*) Vincent and Lee, Co. Litt. 113 a; Cro. Eliz. 26; 1 Leo. 285; 3 Leo. 106; Mo. 147; Dy. 177, side note to pl. 32.

(*q*) Dy. 219, side note to pl. 8; and see Goulds. 2. S. C.

pointed, and the devise was, that the executors should sell, and one died, it was the opinion of Anderson, Windham, and Rhodes, that the survivor could not sell: and there are other authorities to the same effect (*r*). But cases are not wanting on the other side of the question; and in the case of Houell *v.* Barnes, although it was holden that the executors took an authority only, yet Jones, Crooke, and Barkeley, determined, that the survivor could sell (*s*). But Jenkins thinks that this case depends upon the executors not being at first named by their proper names; and that they took *qua* executors. He gives it as his opinion, that if a devise be that A and B, the executors, shall sell certain land, and near the end of the will the testator also names them executors, if the one dies the other may sell, for the interest is annexed to the executorship by this repetition *in the will* (*t*). Mr. Hargrave has endeavoured to establish, that where the power is given to *executors*, or to persons *nominatim* in *that character*, the survivor may sell, as the power is given to them *ratione officii*; and as the office survives, by parity of reason the authority should also survive (*u*). And the liberality of modern times will probably induce the courts to hold, that, in every case where the

(*r*) Lock *v.* Loggin, 1 And. 145; see Jenk. Cent. p. 44.

(*s*) Houell *v.* Barnes, Cro. Car. 382, 1 Jo. 352, pl. 3, nom. Barnes case; Anon. 2 Leo. 220, pl. 276; Milward *v.* Moore, Say. 72; and see Anon. Dy. 371 b, pl. 3.

(*t*) See Foone *v.* Blount, Cowp. 464.

(*u*) N. (2) Co. Litt. 113 a; but see Pow. Dev. 302—310, where, however, the two questions, viz. where executors take a fee, and where if they take only an authority, it will survive, appear to be confounded.

power

power is given to *executors*, as the office survives so may the power. We shall hereafter see that it is well established, that equity will interpose to prevent the consequences arising from the extinction of the power. As the law now stands, it seems :

1. That where a power is given to two or more by their proper names, who are not made executors, it will not survive without express words.

2. That where it is given to three or more generally, as to "my trustees," "my sons," &c. and not by their proper names, the authority will survive whilst the plural number remains.

3. That where the authority is given to "executors," and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it : But,

4. That where the authority is given to them *nominatim*, although in the character of executors, yet it is, at least, doubtful whether it will survive.

I shall close this subject with Sir Edward Coke's advice, to give the authority to the executors or the survivors, or survivor of them, or to such or so many of them, as take upon them the probate of the will, or the like (*x*).

(*x*) Co. Litt. 113 a ; see Townesend *v.* Walley, Mo. 341, Cro. Eliz. 524.

CHAPTER IV.

OF THE TRANSFER OF POWERS.

SECTION I.

OF THE TRANSFER OR DELEGATION BY THE ACT OF THE DONEE.

In considering this branch of our subject, we may enquire, 1st, Whether a power is transferable by the act of the donee of the power; and, 2dly, in what cases it is transferred or executed by force of particular acts of Parliament, or by act of law.

And first, where a man has only a particular power, as a power to lease for life or years, he cannot make a lease by letter of attorney, by force of his power (*x*), because it is not a lease of the land, but a declaration of the prior use; and the lessee comes in by the original agreement under the first settlement. The power is in such case personal to the owner of the land, for it refers to the first settlement (*y*).

So, wherever a power is given, whether over real or personal estate, and whether the execution of it

(*x*) Lady Gresham's case, before Wray and Anderson, Ch. Jus. 9 Rep. 76 a cited; 2 Rol. 393, agreed. See Attorney-General *v.* Gradyll, Bunb. 29; but note, that it was not necessary to decide this point; and see Orby *v.* Mohun, 2 Vern. 542. (*y*) See Palm. 436.

will

will confer the legal or only equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare.* Therefore, where a power of sale is given to trustees or executors, they cannot sell by attorney (*z*). So, where a father had a power of appointment to his children over a real estate, and he delegated the power to his wife, Lord Hardwicke said, that this must be considered as a power of attorney, which could be executed only by the husband, to whom it was solely confined, and was not in its nature transmissible or delegatory to a third person (*a*). Again, where personal estate was given to such charitable use as A should appoint; and he directed the money to be applied as B should appoint, Lord Hardwicke held the delegation void (*b*). So, where a testator gave his wife a power to appoint personalty amongst their children, and she delegated this power by her will to others, Sir Thomas Clarke determined that the delegation was void (*c*); and the point has been so decided by Lord Rosslyn (*d*). On the same ground, a person whose consent is made requisite to the due execution of a power, cannot authorise another as his attorney, to consent to any execution of it (*e*).

It is frequently contended in practice, that a donee

(*z*) Combes's case, 9 Rep. 75 b.

(*a*) Ingram *v.* Ingram, 2 Atk. 88.

(*b*) Attorney-General *v.* Berryman, 2 Ves. 643, cited; and see Doyley *v.* Attorney-General, 4 Vin. Abr. 485, pl. 16.

(*c*) Alexander *v.* Alexander, 2 Ves. 640.

(*d*) Bristow *v.* Warde, 2 Ves. Jun. 336.

(*e*) Hawkins *v.* Kemp, 3 East 410. See Attorney-General *v.* Scott, 1 Ves. 413.

of

of a power cannot execute a deed of appointment by attorney. But the cases by no means authorize this position. They merely establish that the donee cannot delegate the *confidence and discretion* reposed in him to another. Where the deed of appointment is actually prepared, or the donee points out the precise appointment which he is desirous should be made, there no confidence, no discretion is delegated. The appointment is, in every respect, an exercise of his own judgment; and there cannot be any reason why he should not be permitted to execute the *deed* of appointment by attorney. The contrary doctrine would lead to great inconvenience.

Here we must be careful to distinguish cases where the power is originally authorized to be executed by the donee of the power and *his assigns*; for in those cases, where the power is annexed to an interest in the donee, it will pass with it to any person who comes to the estate under him, although there are twenty mesne assignments; and whether the claimant is an assignee in fact, or an assignee in law, as an heir or executor (*f*). In like manner the donee of a power not annexed to an interest, may delegate the power by virtue of an *express authority* in the deed by which it was created (*g*).

And where the power is tantamount to an ownership, and does not involve any confidence or personal judgment, it may be executed by attorney, in the same manner as a fee simple may be conveyed by attorney. Thus, when the statute of 1 Rich. III. gave *cestui que use* power to dispose of the legal estate, it was determined

(*f*) How *v.* Whitfield, 1 Ventr. 338, 339; 1 Freem. 476, 2 Jo. 110, 2 Show. 57. (*g*) See Palliser *v.* Ord, Bunb. 166.

that

that he might execute his power by attorney (*h*). It appears to be on the same ground, that where an estate is limited generally to such uses as a man shall appoint, he may limit it to such uses as another shall appoint. The power is equivalent to the fee simple, and is merely a species of ownership, the delegation of which involves in it no breach of trust, or dereliction of personal judgment. The consideration of this point will be resumed in a future page (*i*).

Where a power which cannot be transferred is delegated, and estates are limited over in default of any appointment, by the person to whom the power is wrongfully delegated, the delegation is simply void, and the estates limited over take effect immediately (*k*).

(*h*) Anon. Dy. 283, a. pl. 30; and Bishop of London *v.* Kellet, cited, ibid; and see Warren *v.* Arthur. 2 Mod. 317, and Combes' case, 9 Rep. 75, b.

(*i*) *Vide infra,* ch. 5, sect. 1.

(*k*) Ingram *v.* Ingram, 2 Atk. 88.

SECTION II.

OF THE TRANSFER OR DELEGATION BY ACTS OF PARLIAMENT AND THE ACT OF LAW.

By the common law, the King was not entitled to conditions vested in persons attainted, nor were they forfeited by any act in which they were not expressly named, for by the general words of all hereditaments they would not pass, although clearly hereditaments (*l*). But by the 33 H. VIII. c. 20. (1) the benefit of rights, entries, and conditions, was expressly given to the crown: that is, the land itself was not given, but only the *benefit* of the condition, by which the land might be reduced into the possession of the party attainted, had he not been attainted (*m*).

The distinctions established upon this legislative provision appear to be, that where the power is inseparably annexed to the person or mind of the donee, it will not be forfeited to the crown by his attainder; but

(*l*) See Marquis of Winchester's case, 3 Rep. 1.

(*m*) See 1 Hale, P. C. 244, s. 4; 2 Hawk. P. C. 453, s. 26.

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(1) By the 7th Ann, c. 21, after the decease of the Pretender, no attainder for treason was to prejudice the right and title of any person, other than the right of the offender during his life. [For the history of this statute, see York on Forfeiture, and 4 Black. Com. 384]. By the 17th Geo. II. c. 39, the operation of the act of Anne was suspended till the death of the Pretender's sons. If these acts had ever operated, they might have occasioned some very nice questions on the doctrine discussed in the text. But by the 39th Geo. III. c. 93, the act of Anne was wholly repealed.

where

where the thing to be done is a mere ministerial or formal act, not inseparably annexed to the person or mind of the donee, but which may be performed by one person as well as another, the power will go to the crown.

Thus, in Dacre's case, where a grant was revocable, upon a mere tender of 5s. it was resolved that such a condition was given to the King (*n*). But if the power is required to be executed under the proper hand, or which is the same, under the hand of the donee (*o*); or any other mode is pointed out to the performance of which the mind or hand of the donee himself is required, the power is not forfeited by his attainder. The difficulty is to apply this rule to the cases which arise.

In Hardwin and Warner (*p*), a power of revocation was given to Sir William Shelley, upon tender to the feoffees of a gold ring, or a pair of gloves of the value of 12*d*. or above, or the sum of 12*d*. he the said Sir William, *tunc declarante et expressante*, that the ten-

(*n*) 17 Eliz. adj. cited by Popham, 4 Leo. 169.

(*o*) Duke of Norfolk's case, 7 Rep. 13, a. cited; Smith *v*. Wheeler, 1 Ventr. 128; 1 Lev. 279; 1 Mod. 16, 38; 2 Keb. 564, 608, 644, 763, 772; 1 Freem. 9. (I)

(*p*) 1 Jo. 134; Latch 25, 69, 102; 2 Roll 293; Palm. 429; Noy 79.

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(1) This case of Smith *v*. Wheeler, was first heard in error when Kelynge was Chief Justice, who remarked, that "if this way be taken, a man may commit treason pretty cheaply." See 1 Mod. 40, and see 2 Keb. 645; and Kelynge deterred Serjeant Maynard from pleading against the crown according to his retainer, by putting it upon him at his peril, on forfeiture of his patent! The case arose upon an act of attainder similar to the act of Hen. VIII.

der was with intent to make void the feoffment. The case was decided against the crown, first in the Exchequer, and then in the Common Pleas; but it appeared that the Attorney-General confessed judgment in the Exchequer, for (as it was asserted) a good fee; and then when he was Chief Justice of the Common Pleas, he was unwilling to contradict his former confession. The difficulty in this case was considerable. When the case was argued in B. R. it was admitted on all hands, that if a tender of a ring, &c. only had been required, the benefit of the power would have been forfeited, and it was also conceded, that in every case of a tender there must be a declaration, although not expressly required by the power. Whitlock and Jones, on these grounds, held that the words *ipso declarante* were only what the law would have implied, and *expressio eorum quæ tacite insunt nihil operatur*. On the other hand, Crew, Chief Justice, and Dodridge (1), held that the power was inseparably annexed to Sir William's person. They with great reason took a distinction between a general declaration implied by law, and a special declaration like this, which they thought was *personal* to Sir William Shelley.

In a subsequent case a decision was pronounced, which savours but too much of the despotic times in which it was made. I allude to Englefield's case (*q*).

(*q*) 7 Reports 78; Mo. 303, the best report; Popham 18, 4 Leonard 135, 169, and other books.

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(1) Palmer's is perhaps the best report of this case; and he says that Randall agreed with Crew and Dodridge: but however this may be, the judgment of C. B. was of course affirmed.

In

In a settlement made by Sir Francis Englefield on his nephew, it was expressed, that because his nephew was an infant, so that his proof was not then seen, and because his uncle did not think convenient to settle the inheritance in the nephew absolutely, so long as the uncle should live, without a bridle to restrain him, if after he should be prodigal, or should be given to intolerable vices: Therefore it was provided, that if the uncle by himself, or by any other during his life, delivered or offered to the nephew a gold ring, to the intent to make void the uses, that then all the uses should be void. Manwood, C. B. and Clerke and Gent, Barons, held that the power was forfeited by the attainder of Sir Francis. They said that the whole force and effect of the condition did consist in the tender of the ring, and that the reason and the cause which moved and induced him to have the said power and bridle in himself, was *not any parcel of the proviso, but a flourish and preamble,* and nothing was parcel of the condition, but that which came after the proviso, and that was the tender of the ring. Sir Edward Coke reports, that the counsel for the Defendant, (of whom he was one), were dissatisfied with this decision, and their advice was to bring a writ of error; but in order to set the question at rest, an act of Parliament was immediately passed to establish the forfeiture, which plainly evinces that the court party was resolved to obtain the estate, whatever might be the law on the question. The act (*r*), after reciting the attainder and the conveyance, with the proviso, enacted, that the Queen was lawfully entitled to take advantage of the proviso, in the same

(*r*) 35 Eliz. c. 5.

form as Sir Francis might have done, and that the proviso was well performed by the Queen's commission (*s*).

These cases, however, cease to be important at the present day, as questions of a similar nature never arise. Happily the nation is no longer rent by those intestine struggles which lead men of property to incur the guilt of treason. The practice of requiring a tender of money, gloves, &c. or the performance of any act which could, by the greatest stretch, be construed as not inseparably annexed to the mind or hand of the donee of the power, has been long since entirely discontinued; and instead thereof, it became usual to require the power to be executed by the donee, by writing under his hand, to which certain other solemnities were in general required; and this is the mode in which powers are reserved at the present day. Now such powers as we have seen, are not forfeited, under the existing laws, by attainder for treason; and it can scarcely be supposed that penalties will ever be attached to treason by the legislature, which the court dared not to impose in the worst of times.

Where the power is given to the crown, the ability to perform it is also given as incident to it. The King may commission another by letters patent to perform the act; and upon performance of it, the old uses determine without office found (*t*).

But even where the benefit of the power is given to the King, it must of course be executed during the life of the original donee of the power, for with his death the power ceases.

(*s*) See Hale, P. C. 245.

(*t*) Englefield's case, Hardwin v. Warner, *ubi. sup.*

Thus we have seen how tender the law is in these cases, and that powers annexed to the mind or hand of the donee, do not pass to the crown, notwithstanding the express words of the statute of Henry VIII.

But where the King's debtor has a power of revocation for his own benefit, whatever are the ceremonies required to its execution, and although he die, without executing the power, the land may be extended for the debt, by virtue of the King's prerogative. The Judges have in all times been studious to advance the remedy for the recovery of the King's debts, for (as Dodridge observed) it is for the increase of his treasury, and the treasury is the King's strength, and the King's strength is *vinculum pacis* and *nervus belli*, the overflowing fountain of his beneficence and benevolence (*u*).

So, where the donee of a power of revocation commits a contempt against the King's prerogative, the lands may be seised in the same manner as if he had executed the power for his own benefit. Thus, where a man having a power to revoke a settlement went abroad, and the King sent his privy seal to him, requiring him to return into the realm, which he refused to do; upon oath of the fact made by the messenger, by whom the privy seal was sent, process was issued against the terre-tenants, and judgment was given that they should forfeit the lands for the contempt (*x*) (1).

(*u*) Sir Edward Coke's case, 2 Roll 294, Godb. 289.

(*x*) Sir Robert Dudlie's case, 2 Roll 304, cited.

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(1) That is, till the return of the person committing the contempt, when he is liable to fine and imprisonment. See William de Brittaine's case, Dy. 128, b. pl. 61, cited. The Fugitive's case, Dy. 375, b. pl. 21; 1 Hawk. P.C. pa. 59, s. 4.

And

And here we must notice the case of a power of appointment vested in a bankrupt. The statute of 13th Elizabeth, c. 7, s. 2, enables the commissioners to dispose of any estate, for such use, right, or title as such offender then shall have in the same, "which he may lawfully depart withal:" and the statute of 21 Jac. I. c. 19, s. 1, directs the bankrupt laws to be expounded most favourably for the relief of creditors. We have already seen that a power is a mere right to declare the trust of the estate, upon which declaration the statute of uses immediately operates. It is, therefore, clearly an use, interest, or right which the bankrupt *may lawfully depart withal*. And the better opinion, perhaps, is, that the bargain and sale of the commissioners will have the same operation, as a due execution of the power by the bankrupt whilst solvent would have had. This point has not only never been decided, but there is not, I believe, even a *dictum* in the books on the subject. I have seen very respectable opinions, that the power is not affected by the commission, but I have never seen any reasons given in favour of that doctrine.

CHAP.

CHAPTER V.

OF THE EXECUTION OF POWERS.

We now enter on a large field of enquiry. I propose to consider, 1. The mode in which a power ought to be executed, particularly with reference to the statute of uses. 2. By what instruments it may be exercised, where the power is silent in that respect. 3. Where conditions or restrictions required or annexed to the execution of powers are duly complied with. 4. At what time a power may be executed, which will involve the consideration of partial executions. 5. Where a power is well executed, although not referred to, and the donee has not an *interest* in the estate. 6. What is deemed an execution of a power where a man has both a power and an interest. 7. What qualifications may be annexed by persons executing powers; and, 8th and lastly, The effect of the execution.

SECTION I.

OF THE EXECUTION OF POWERS, PARTICULARLY WITH REFERENCE TO THE STATUTE OF USES.

First then, we must bear in mind that a power is a mere right to limit an use. Now the statute, as we have seen, executes only the first use; or, as it is usually expressed, an use upon an use is void. This rule, therefore,

therefore, renders it indispensably necessary to appoint *immediately* to the person intended to take, unless the parties are desirous that he shall not have the legal estate; for if the estate should be appointed to A, to the use of B, A would be the person to whom the use would arise under the original seisin; and by force of the statute, the legal estate would be vested in him; then the use to B, being limited to arise out of the use to A, would be void at law, although good as a trust in equity. To apply this point to practice, let us suppose an estate to stand limited to such uses as A shall appoint by deed, to be executed in the presence of, and attested by two witnesses, and that A is desirous of conveying the estate to such uses as B shall appoint. The appointment should run thus (1): Now this indenture witnesseth, That in consideration, &c. and pursuant to, and by force and virtue, and in exercise and execution of the power or authority to him the said A for this purpose given or limited, by the hereinbefore in part recited indenture, [the deed creating the power, which should always be recited]; and of every or any other power or authority, in any wise enabling him in this behalf; he the said A, doth by this present deed, by him sealed and delivered in the presence of, and attested by the two credible persons whose names are intended to be hereupon indorsed, as witnesses attesting the sealing and delivery of these presents, by him the said A, direct, limit, and appoint, That all that [parcels and general words], shall henceforth remain and

(1) See a precedent of such an appointment at length, Appendix, No. II.

be,

be, to the use of such person or persons, &c. as B shall appoint in the usual manner. By this mode the estates which may be created by B, under the power vested in him, will at once, by force of the statute of uses, attract the original seisin; and, as we shall hereafter see, take effect in the same manner as if they were expressly limited in the deed creating the power. But if the appointment had been made to B and his heirs, to the uses, the statute would instantly vest the legal estate in B, and the intended uses would be mere trusts in equity.

In Rich *v.* Beaumont (*n*), a question arose upon the doctrine under discussion, which ought not to be passed unnoticed. By a settlement, an estate was vested in trustees in fee, upon trusts, but the wife had a general power of revocation and appointment, which she exercised by will, and devised the estate to her son and husband, and then "she ordered and directed, that her trustees, or such of them as should be living named in the settlement, should *convey their trust estate* to such uses, and for such persons as were named in her will." Upon a bill filed in equity by the husband, to confirm the appointment, and obtain a conveyance of the legal estate, Lord Chancellor King dismissed it, and as against the trustees with costs, his Lordship declaring, that if the husband had any title to the premises in question, his remedy was proper at law, and not in equity. From this decree there was an appeal to the House of Lords; and for the appellant it was insisted, that by the clause in the will, directing the trustees to convey the estate to the uses of the will, she expressly

(*n*) 3 Bro. P. C, 308.

declared

declared her intention to be, that the legal estate should remain in the trustees. And that if the will was construed to enure as a revocation of the legal estate out of the trustees, rather than as a declaration of the trusts of that estate; the same would, by such construction, be made to enure contrary to the express words thereof, and contrary to the manifest intention of the party therein declared. For the respondent it was insisted, that if the will was a good revocation, the uses limited to the trustees were revoked, and consequently their legal estate was taken away and vested in the appellant; and then there was no foundation for his applying to a court of equity, to have a conveyance from the trustees. The House of Lords reversed the decree, and ordered a case to be referred to the Court of King's Bench for their opinion, "Whether the trusts limited by the will be uses executed, or trusts." It does not appear what the opinion of the judges on this point was. There can, however, be little doubt but that in this respect they agreed with Lord Chancellor King. Where the legal estate is required to be in trustees, to preserve contingent remainders, &c. a clause like that in the above will, may well be holden to operate as an appointment to the trustees; and then the persons beneficially intitled will take mere trust estates; but if, as in the above case, the effect of giving the legal estate to trustees, is merely to make a conveyance from them necessary, the first appointment ought certainly to be deemed the limitation of the use, so as to carry the legal estate. And the subsequent clause may be struck out as repugnant or superfluous.

It will be collected from the precedent in a preceding page, 1. that the deed executing the power should be expressed

expressed to be in exercise of it; 2dly, of every other authority enabling the donee in that behalf; and, 3dly, that it should be shown in the body of the deed, that the formalities required to the execution of the power are complied with. Every well-drawn deed of appointment embraces these three points; the first clearly evinces the intention of the person executing the power, which is particularly necessary where he has an interest as well as a power; the second guards against any misrecital of the deed creating the power, and in some cases has reached powers which have been understood to be extinguished; and the third affords internal evidence of the ceremonies having been complied with. And, moreover, the attestation indorsed on a deed executing a power, should always state precisely, that the formalities were attended to. How far these circumstances are absolutely essential to the valid execution of the power, will appear hereafter (*o*).

Where a man has both a power and an interest, as if he have a general power of appointment, with remainder to himself in fee, or for any less estate, he is constantly made not only to exercise his power, but also to convey his interest. This may appear to be unnecessary, as the execution of the power divests the estates limited, in default of its execution; but it is done in most cases, to guard against the power having been suspended or destroyed, in some, to guard against any defect in the creation of the power. The correct mode of effecting this is, first, to exercise the power, and limit the estate to the uses afterwards declared; and

(*o*) As to the first and second, see *post.* s. 6; and as to the third, see *post.* s. 3.

then,

then, by a separate witnessing part, to convey the estate to the intended uses. Indeed, this should always be done where the fee simple is intended to be conveyed to uses, although, as we shall hereafter see, if the estate be limited and appointed, granted and released to A, to the uses, the courts will endeavour to construe the conveyance a release, and to consider the words of appointment as mere surplusage, in order to effectuate the intention (*p*). This, however, cannot be done where the conveying party has not the fee in default of appointment.

Where it is intended to vest the fee simple in the party to whom the appointment and release are made, although it would certainly be an inartificial mode of conveyance, yet a deed, in which the appointment and release were blended, would effectually vest the fee in the appointee and releasee, and be entirely free from objection. But it is to be observed, that although it is usual not only to exercise the power, but also to convey the interest, yet even a purchaser would not be entitled to require a conveyance of the interest, limited in default of appointment, unless it could be conveyed without a fine, or common recovery. There are many cases in which a purchaser is compelled to take an estate merely under an execution of a power, as where, in default of appointment, the estate is limited in strict settlement.

The usual limitation to bar dower is to such uses as the purchaser shall appoint; and, in default of appointment, to him for life, remainder to a trustee and his *heirs* during the life of the purchaser, in trust for

(*p*) *Vide infra.* sect. 6.

him,

him (1), remainder to the purchaser in fee. This limitation has two objects; the one to enable the purchaser

(1) Instead of limiting the estate to the trustee and his *heirs*, it is sometimes limited to him, his *executors and administrators*, it being understood that executors or administrators may take as special occupants. Lord Hardwicke always treated this point as clear; Duke of Marlborough *v.* Lord Godolphin, 2 Ves. 61; Williams *v.* Jekyll, 2 Ves. 681; Westfaling *v.* Westfaling, 3 Atk. 460, 7 Ves. Jun. 446, cited from Lord Hardwicke's notes; and Lord Eldon has expressed the same opinion; see Ripley *v.* Waterworth, 7 Ves Jun. 425. But in the case of Campbell *v.* Sandys, 1 Sch. and Lef. 281, Lord Redesdale said, that the old authorities seemed the other way, and if the case were before him, he should feel great difficulty in determining according to the apparent opinion of Lord Hardwicke. Lord Redesdale, in support of his opinion, referred to two cases stated in Ro. Abr. tit. Occupant (G.) 2 and 3; the first of which is reported in Dyer 328, b. pl. 10, and in Leonard's third volume, p. 35, by the name of Lord Windsor's case, and is stated by Roll as a determination, that if a lease be made of land to a man and his executors *pur auter vie*, the executor shall be special occupant, although it be a freehold. He also referred to Comyn's Digest, Estates, F. 1, tit. Occupant, where the case in Dyer is stated as a decision, that the executor shall not have the land as special occupant, for an occupant has the freehold, which an executor cannot take; and Comyn also refers to the second case stated by Roll, as an authority for this point. "That case," my Lord Redesdale added, "which was long subsequent to the case in Dyer, is certainly in conformity to the opinion of Comyn; and according to Salter *v.* Butler, Moore 664, Cro. Eliz. 901, Yelv. 9; and the law seems to have been understood by Peere Williams, 3 P. W. 264, note D, as so settled, though Peere Williams does not appear satisfied with it."

Now it is not too much to say, that no point is in practice considered more clear than that an executor or administrator may take a freehold estate as special occupant. The contrary opinion seems to have arisen from the case of a corporeal hereditament, of which there may be an occupancy, and the case of an incorporeal hereditament, as a rent, of which there cannot be any occupancy, having been confounded. Roll seems to have drawn a just conclusion from the case in Dyer and Leonard. It

 appears

chaser by an exercise of his power, to convey the estate without the concurrence of his trustee, and the other by

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appears to have been taken for granted in that case, that an executor might be a special occupant, but there the tenant *pur auter vie* had made a lease; and the question was, whether the *lessee* should not be occupant. In the next case stated by Roll, the determination was, that of a freehold *rent*, the executor could not be special occupant. Lord C. B. Comyn without doubt confounded these cases; for in support of his position, that an executor cannot take a freehold as special occupant, he refers at once to the case in Dyer, and the last case in Roll, whereas that case turned upon a corporeal, this upon an incorporeal hereditament: no two cases can be more distinct. The reason stated by Comyn, "that an occupant has the freehold, which an executor cannot take," is copied from Roll's last case; but there the reason is, "because that *that* [viz. the *rent*] is a freehold, which cannot descend to the executor," and not that a freehold generally may not be taken by an executor as special occupant. The case of Salter *v.* Butler, which is referred to by Comyn and by Lord Redesdale, was also the case of a rent, and there the claim was by an administrator, and the rent was granted to the intestate, his executors and assigns, so that he could not claim as occupant, because the interest was not capable of occupancy, not by the grant, because he was not an assignee. As to Peere Williams, he simply refers to the second case in Roll, to show that an executor cannot be a special occupant of a rent, although he seems to think that upon principle, an executor might be a special occupant of even a rent, as well as an heir; so that if his opinion should be thought to bear upon the point, it is in favour of the executor's ability to take as special occupant.

Lord C. B. Gilbert has taken the precise distinctions on this head, for which he refers to Roll's Abridgment, and the case in Dyer. That learned writer lays it down as clear, that an executor may take a freehold as special occupant; for though it be a freehold, which in course of law would not go to executors, yet they may be designed by the particular words in the grant to take as occupants; and such designation will exclude the occupation of any other person, because the parties themselves, who originally had the possession, have fixed it up by this appointment. But, he adds, that if a *rent* be granted to J. S. and his executors, during the life of B, by the death of J. S.

by interposing the limitation to the trustee, to prevent the fee from vesting in the purchaser, in default of appointment, (for it has been doubted whether a right of dower attaching on the inheritance can be defeated by the execution of the power), and at the same time to leave no legal estate outstanding, when the object for which it was created has ceased to exist. When the owner sells, although it is clear, that by virtue of his power he may convey the fee to the purchaser, yet I may say it is almost the universal practice of the profession, not only to make the vendor exercise his power, but also to make the vendor and his trustee convey their interests in default of appointment. Sometimes a difficulty arises in procuring the concurrence of the trustee; and if the purchaser is satisfied that the power was well created, and is in existence, he may safely dispense with his concurrence. But if this be not the case, the purchaser ought to insist on the trustee joining, as the entire fee simple could not be gained without a conveyance from him. Besides, it might turn out that the owner had destroyed his power, and forfeited his life estate; in which case the freehold in possession would be vested in the trustee, and an ejectment could not be maintained under a conveyance in which he did not join. Whether a purchaser is in all cases intitled to insist upon the concurrence of the trustee, is perhaps not a

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J. S. the rent is determined, because the executors cannot take as special occupants, since the nature of the thing lying in agreement, is not capable of occupation; nor can they take by the grant, because then they must take as representatives, which they cannot be of a freehold; and the law will not permit people at their pleasure to vary the course of descent. Bac. Abr. tit. Estate for life, s. 3; and see Savery v. Dyer, Ambl. 140.

clear point. In a case nearly similar to this, in the year 1748, Mr. Marriott and Mr. Wilbraham thought that the purchaser could not insist upon the concurrence of the trustee; but this appears to have proceeded, in a great measure, from their opinion, that in the case before them, the limitation to the trustee was contingent. Mr. Booth thought the limitation a vested remainder; and he considered the trustee to be a necessary party to join in the conveyance to the purchaser. He said, although it were true that if the vendor's power remained entire, untouched, unextinguished, or suspended, then the use might well enough arise to the purchaser; yet he might venture to affirm, he never saw a deed settled with good advice, but what not only contained an appointment in virtue of the power, but also a grant by way of conveying the estate and interest of the vendor, and all claiming under or in trust for him. The parties agreed to be bound by Mr. Filmer's opinion; and he thought, with Mr. Booth, that the purchaser was intitled to require the concurrence of the trustee, who accordingly joined (*r*).

It has just been stated to be doubtful, whether, when the fee is vested in the donee, in default of appointment, a right of dower, which has attached on the fee, can be defeated by an exercise of the power. This doubt will be considered hereafter (*s*). Until the point is decided, it is in these cases absolutely necessary, not only to make the husband exercise the power, but also to make him and his wife join in levying a fine, in order to extinguish her right of dower. The fine must be at the vendor's expence.

(*r*) 2 vol. Ca. and Opin. 29, and MS. in *tot. verbis.*

(*s*) *Vide infra*, sect. 8.

In

In a preceding page I put the case of an estate being conveyed to such uses as A shall appoint, and of his desire to convey the estate as B shall appoint. Perhaps there is no conveyancer to whom, in the early part of his professional life, a doubt has not presented itself in regard to the validity of such an appointment. Two objections have been made to it which have come within my observation; the one, that it is contrary to a known principle that a power cannot be delegated; and the other, that it is a new attempt at a perpetuity. Both these objections are easily answered. As to the first, the rule that a power cannot be delegated, is not, as we have seen, a general inflexible rule, but is simply a regulation, that a *confidence* reposed in one cannot by him be delegated to another (*t*). This rule, therefore, is inapplicable to the case before us. For no *confidence* was reposed in A, but the estate was, merely for his own convenience, conveyed to such uses generally as he should appoint. In regard to the second objection, the limitation has no greater tendency to a perpetuity, than a simple conveyance in fee. Under the power in question, the donee may tie up the estate for exactly the same period, but not longer, than he could were he seised in fee. This will be explained hereafter (*u*). To recur once more to the *nature* of powers, let us put the same case *before* the statute. A seised in fee, in trust to dispose of it as B shall direct; B directs A to dispose of it as C shall direct. To this no objection can possibly be framed. Then comes the statute, which does not operate with effect till the last power is exercised. When B exercises his power, it in truth ope-

(*t*) *Vide supra*, ch. 4, sect. 1. (*u*) *Vide infra*, ch. 9, sect. 1.

rates as a transfer of his equitable estate or right, and the seisin originally created (whether it remain in A, or be in nubibus, or in terra incognita, or in custodia legis) waits until estates are raised by C's power; and when this last power is exercised, and not till then, the statute transfers the legal estate.

In well drawn deeds, in which powers of sale and exchange, and of appointment of new trustees of real estate, are inserted, it is usual to give the trustees of the powers an express authority to revoke the old uses, and to appoint such new uses as will effectuate the intention of the parties, and the declaration for this purpose cannot be too general. Therefore, in the power of sale, it should not be declared that the trustees shall appoint to the purchaser in fee, as a doubt might be entertained by some, whether it warranted an appointment to uses to bar dower; but the trustees should be authorized to limit such uses as will carry the contract into execution. It is not, however, necessary to give *express* powers of revocation and new appointment, for whatever be the form in which a power of sale is given, it will operate as a power of revocation and new appointment, and may be executed accordingly. Thus, it was clearly holden by the Lord Keeper, in the Bishop of Oxford *v.* Leighton, that a direction that a releasee to uses in a settlement should convey to such uses as A should appoint, amounted to a power of revoking and limiting new uses, although the proviso was unskilfully penned (*u*).

All old powers of sale and exchange merely express, that the trustees may sell or exchange the land, and do not give express powers of revocation and new appoint-

(*u*) 2 Vern. 376, *supra*, ch 2.

ment.

ment. Sometimes the trustees are made merely to "appoint and make sale of," or to "appoint and sell" the lands to the uses: the words of the power being followed, with the addition of the word *appoint*; and sometimes they are made to expressly revoke the uses of the settlement, and then to appoint to the new uses. Either mode will effectuate the intention. The latter is sometimes objected to by unskilful persons as not authorized by the power. But to this objection the Bishop of Oxford's case is a decisive answer. The same observations apply to powers to appoint new trustees.

The power of appointing new trustees usually inserted in settlements, directs, that upon the appointment of a new trustee, all such conveyances, &c. shall be executed as will effectually vest the estates in the old and new trustees, to the uses of the settlement. And declares, that every new trustee, when appointed, shall have the same powers, &c. as if nominated in the deeds. Now, it seems quite clear, that no more was originally intended by this power, than that the trustees to preserve contingent remainders, should transfer the estate limited to them for that purpose (which is a vested (*x*) remainder), or any other estate actually vested in them, to the new trustees, who would be enabled to exercise the different powers of sale and exchange, &c. created by the settlement, under the express direction contained in the deed, that every new trustee should have the same powers as the old trustee had. But it has become usual to consider it essential, that the new trustees should have a seisin to serve the uses, in the same manner as the old trustees had, although it does not always happen that

(*x*) See Dormer *v.* Fortescue, Willes 327.

the trustees of the powers are the persons seised to the uses, nor is it at all necessary that they should be. To raise this new seisin two deeds are necessary; by the first, the uses of the settlement must be revoked, and the estate appointed to a stranger in fee, and the old trustees must join in conveying the estate to him, and then the stranger must reconvey (which he may do by indorsement) to the uses of the settlement, in the same manner as if the new trustee's name had been inserted therein. The power of revocation and new appointment is considered to be clearly implied by the declaration in the power; and, supposing no such power to exist, yet the estates to preserve contingent remainders are effectually vested in the old and new trustees by the actual conveyance. This mode assumes that there is a seisin in the releasees to serve the uses, and that that seisin is not transferable, for otherwise it would not be necessary to defeat the old uses, and raise a new seisin in the old and new trustees to serve them. If it ever should become necessary to decide the point, there is little doubt but that it will be determined; 1. That the power only means that the estates actually vested in the trustees shall be transferred to the old and new trustees, which may be done by one deed operating under the statute of uses: 2 That they may then exercise the powers created by the settlement: and, consequently, 3. That there is no seisin in the trustees to transfer, and therefore the revocation and appointment is nugatory and of no effect. Of course these observations do not apply to a case where the fee simple is vested in the trustees. In that case, clearly, one conveyance only is necessary. The old trustees may convey by lease and release to the new

trustee,

trustee, to the use of himself and the old trustees in fee, upon the trusts.

Admitting that the usual power of appointment requires the seisin (if there be any) in the old trustees, to be vested in the new trustees, it will not be denied by the most strenuous supporters of this doctrine, that this ceremony is not necessary where the power expressly negatives that construction: the powers in the settlement, it is quite clear, may be executed by a person not having any seisin vested in him to serve the uses: therefore, to prevent the necessity of this artificial, circuitous mode of appointing new trustees, it might be adviseable to expressly declare in the deed creating the power, that upon the appointment of any new trustee, the estate of the trustees to preserve contingent remainders shall be conveyed to the continuing and new trustees, to the uses of the settlement. And that every new trustee may act in the execution of the powers, without being invested with the seisin (if any) in the old trustees to serve the contingent or future uses. The usual power of revocation and new appointment introduced into this power of appointing new trustees is, however, to be preferred, as its operation is now generally known: a circumstance which is in practice of infinitely greater importance than the expence of an additional deed.

The distinctions taken in a preceding chapter, between powers deriving their effect from the statute of uses and common law authorities, will have led the reader to observe, that the observations in the opening of this chapter, as to the necessity of appointing to the uses at once, do not apply to common law powers.

Where the power is given by will, without a seisin to serve

serve the estates to be created, it is a mere common law authority; and it should, therefore, seem, that an appointment by virtue of such a power to A, to uses, would not of itself vest the legal estate in A, but would give the legal estate to the real objects of the appointment; for the question is free from the technical objection of an use upon an use, and the single point to be ascertained, is the intention. The appointment merely operates as the designation of a person to take under the will, a devise to him, by which, either directly, or through the medium of a devisee to uses, would have given him the legal estate according to the intention of the testator. But where the power is given through the medium of a devisee to uses, if it should be thought that it operates under the statute (*y*), the appointment must receive the same construction as an appointment under a like power created by *deed*. Powers under wills and deeds are both distinguishable from a power to convey an estate under a letter of attorney. The estates raised by the execution of a power (whether it be created by deed or will) take effect as if limited in the instrument creating the power. A devise of an authority is within the statute of wills (*z*), and when the authority is exercised, the estates created by it come in lieu of the authority. In the case of a deed creating a power, the seisin or interest to serve the estates is actually raised by the deed itself, and the estates limited under the power accordingly derive their essence from that seisin: but in the case of a common letter of attorney, no seisin is created, nor does the *estate* pass by or by virtue of the power, which merely authorizes the attorney to *convey* the estate in the name of the

(*y*) *Vide supra*, p. 118.

(*z*) Townesend *v.* Walley, Mo. 341.

principal.

principal. The conveyance is, in fact, the deed of the principal, and it is considered as executed by him. It is, therefore, essential that the deed should be an operative, independent, and substantive conveyance. If it be a feoffment, it must be accompanied with livery of seisin; if it be a bargain and sale, it must be enrolled; and if it be a release, it must be grounded on a bargain and sale for a year under the statute, or a lease at common law with actual entry. And the land may consequently be conveyed to one to uses, and the statute will execute the uses. The estates created will depend simply on the instrument in which they are contained, although the deed itself depends for its validity *as a conveyance,* upon the letter of attorney, by virtue of which it was executed; for the power must be produced before the deed can be read in a court of justice (*a*). And we may here dismiss the consideration of letters of attorney, with this one observation, that the deed must be executed in the name of the principal; but where that is done, it is immaterial whether the attorney place his own name first or last. Therefore, an execution thus, "for A. B. (the principal), C. D. (the attorney), L. S. is valid (*b*).

It is usual to declare in powers of revocation and new appointment, that the donee may revoke, and by the *same,* or any other deed, appoint new uses; but it is clear, that without this provision, a power of revocation and new appointment may be executed by the same instrument, unless the deed creating the power expressly require distinct deeds. The former uses cease *ipso facto* by the revocation, without entry or claim (*c*). The instrument

(*a*) Johnson *v.* Mason, 1 Esp. Rep. 89.

(*b*) Wilks *v.* Backs, 2 East. 142.

(*c*) See *post,* sect. 8.

is,

is, in construction of law, first, a revocation of the old uses, and then a limitation of the new uses (*d*). Nor is this the only case in which the law adjudges priority in distinct parts of one and the same deed. It is upon this principle, that a lease and release in the same deed, although certainly a very informal conveyance, has been several times ruled to be a good conveyance, for priority shall be supposed. We have seen that every power is, in effect, a power of revocation and new appointment; and it is, therefore, in many cases of absolute necessity that the powers should be allowed to be executed by the same deed.

Where it is intended not to make an irrevocable appointment, an express power of revocation should be reserved in the deed executing the power: if it be omitted the appointment cannot be revoked (*e*).

(*d*) Digges's case, 1 Rep. 164—6 resol. S. C. Mo. 663; Co. Litt. 237 a. (*e*) *Vide infra*, sect. 7.

SECT.

SECTION II.

OF THE INSTRUMENT BY WHICH A POWER MAY BE EXECUTED.

WHERE a power is given generally, without defining the mode in which it must be executed, it may be exercised either by deed or will; and as the operation of the instrument will simply be to declare the use, to serve which we must assume that a sufficient estate is already legally created, an estate of freehold may be limited without livery of seisin, a bargain and sale for a year, or an actual entry by the appointee; nor is it essential that the power should be executed by *deed*, a simple note in writing, even unattested, would be a good execution of the power (*f*). So whether it be a common law authority given by will, or a power operating under the statute of uses, it may be executed by feoffment (*g*), covenant to stand seised (*h*), lease and release (*i*), or lease and release and fine (*k*). But although all these modes are effectual, yet they are improper appointments. They do not operate as a feoffment, covenant to stand seised, lease and release, or fine; but as an appointment of the

(*f*) Saunders *v.* Owen, 2 Salk. 467; and see 3 East 440.

(*g*) Daniel *v.* Upley, Latch 9, 39, 134; 1 Jo. 137.

(*h*) Stapleton's case cited by Hale, Chief Justice, 1 Ventr. 228; Dame Hasting's case, Raym. 239; 3 Keb. 511 cited, S. C. Right *v.* Thomas, 3 Burr. 1141.

(*i*) Dyer *v.* Awsiter, 1 P. Wms. 165 cited, 10 Mod. 34 nom. Gier *v.* Osseter; Dighton *v.* Tomlinson, 1 Com. 194, 1 P. Wms. 149.

(*k*) *Vide supra*, p. 68.

estate,

estate, or direction, or declaration of use under the power. Therefore, if a power under the statute is, for instance, executed by lease and release, upon which uses are declared, the releasee will be invested with the legal estate by force of the statute, and the real objects of the deed will take mere trust estates.

Although where a power is not restrained to be executed by deed, &c. it *may* be executed by a simple note in writing; yet, if the power relate to *real* estate, and the donee exercise it by *will*, the will, it is said by most writers, must be executed as a proper will, and must consequently be attended with the solemnities required by the statute of frauds.

The cases cited for this position are, Longford *v.* Eyre (*l*), and Wagstaff *v.* Wagstaff (*m*); but, in the last of these cases, the trust was for A, his heirs and assigns, *or to such person or persons as he or they should direct;* and Lord Macclesfield held this to be no more than a common trust of lands in fee simple, for the last words were no more than what was implied before, and *expressio eorum quæ tacite insunt nihil operatur*. And in the first of the above cases, the power was expressly required to be exercised by "*will*," or, "writing in the nature of a *will*," which words are construed to mean such a will as is proper for the disposition of lands within the statute of frauds; and I have not met with even a *dictum* in the books that where a power is given generally, and without reference to any instrument, a will made in execution of it must be treated as a proper will of real estate. It seems, indeed, once to have been holden, that if a power, although not required to be

(*l*) 1 P. Wms. 740. (*m*) 2 P. Wms. 258.

so,

so, was executed by bargain and sale, the deed must be enrolled as a proper bargain and sale; but Lord Chief Justice Hale was decidedly against this construction (*n*). His is certainly the better opinion. And, in regard to a *will*, it would be rather a refined distinction that the power may be executed by a simple note in writing unattested; but that if it be thrown into the shape of a will, it must be executed in the same manner as a proper will of land. It must be admitted, that a power may be given to appoint real estate by will without any witness (*o*); and it would, therefore, be a great stretch to hold that three witnesses are necessary in the case under discussion.

(*n*) Ingram *v.* Parker, Raym. 239; 3 Keb. 511, 538; 1 Ventr. 290, 291. (*o*) *Vide supra*, ch. 2, sect. 1.

SECTION III.

OF THE COMPLIANCE WITH CONDITIONS ANNEXED TO A POWER.

We now come to the cases in which particular circumstances are required to attend the execution of the power: these are generally, first, a particular instrument; secondly, a particular mode of execution; and, thirdly, conditions not strictly relating to the instrument, as the consent of third persons, tender of money, or the like.

Where forms are imposed on the execution of a power, it is either to protect the remainder-man from a charge in any other mode, or to preserve the person to whom it is given from a hasty and unadvised execution of the power. In each case the circumstances must be strictly complied with: in the first, it would be in direct opposition to the agreement to consider the estate charged when the mode pointed out is not adhered to (*p*); in the second, to dispense with the solemnities and forms required to attend the execution of the power, is to deprive a man of the bridle which he has thought proper to impose on his weakness or frailty of mind, in order effectually to guard himself against fraud and imposition (*q*). Besides, the circumstances required to the execution of a power are perfectly arbitrary, and (except only as they are in fact required) unessential in point of effect to the validity of any instrument by which the power

(*p*) See 7 Ves. jun. 506.

(*q*) 3 Cha. Ca. 66, 107; and see Piggot *v.* Penrice, Com. 250.

may

may be exercised. This is laid down and admirably enforced by Lord Ellenborough, Chief Justice, in the great case of Hawkins and Kemp (*r*). There the terms of the power required that the revocation should be by deed or instrument in writing, executed in the presence of, and attested by, three credible witnesses, and enrolled in one of his Majesty's Courts of Record at Westminster, and with the consent and approbation of Hawkins's wife, his father, father-in-law, and also of several trustees, being in all nine persons. The Lord Chief Justice said, that every one of these required circumstances was in itself perfectly arbitrary, and (except only as it was, in fact, required) unessential in point of effect to the legal validity of any instrument by which the old uses should be revoked or new uses declared. It was in itself immaterial whether the instrument or writing, purporting so to revoke and declare the uses, should be by deed; whether such deed should be executed in the presence of what, or any, number of witnesses; whether it should be afterwards attested by the witnesses, and ultimately enrolled in any Court of Record; and whether it should be sanctioned by the consent and approbation of the several trustees named for that purpose. It might (if it had so pleased the parties creating the power) have been done by any writing of the persons so authorized, unsealed, unattested, unenrolled, and unsanctioned, by any consent or approbation whatsoever. If these circumstances were unessential and unimportant, except as they were required by the creators of the power, they could only be satisfied by a strictly literal and precise performance. They were incapable of ad-

(*r*) 3 East 410.

 mitting

mitting any substitution, because these requisitions had no spirit in them which could be otherwise satisfied; incapable of receiving any equivalent, because they were in themselves of no value.

If, therefore, a writing is required, a disposition by parol will be invalid, although the property might by law be so disposed of (*s*). If the power is required to be executed by deed to be enrolled, the deed must accordingly be enrolled; if a particular court be named, that court must be resorted to (*t*). If the consent of particular persons be required, their consent must be obtained (*u*). If two witnesses are required, one will not do; if the witnesses are to be of the rank of noblemen, commoners will not satisfy the words (*x*). If sufficient subsidy men be required as witnesses, sufficient and credible persons who are not subsidy men will not be good witnesses (*y*). If a seal be required, an instrument under hand only will be an invalid exercise of the power (*z*). If the instrument is to be signed, it cannot be executed otherwise (*a*) (1); and if signature and

(*s*) Thruxton *v.* Attorney-General, 1 Vern. 340.

(*t*) Digges's case, 1 Rep. 173.

(*u*) Hawkins *v.* Kemp, 3 East 410; and see Mansell *v.* Mansell, Wilm. 36.

(*x*) Bath and Montague's case, 3 Cha. Ca. 55, 2 Freem. 193.

(*y*) Kibbet *v.* Lee, Hob. 312; see 3 Cha. Ca. 90.

(*z*) Dormer *v.* Thurland, 2 P. Wms. 506.

(*a*) Birde *v.* Stride, Bridg. 21 cited.

(1) The statute of frauds (29 Car. 2, c. 3, s. 5) requires wills of lands to be in writing, and *signed* by the devisor. Upon the authorities it is a question, whether *sealing* is not *signing* (Lemayne *v.* Stanley, 3 Lev. 1; Lee *v.* Libb, 1 Show. 69; Warneford *v.* Warneford, 2 Str. 764; Smith *v.* Evans,

and sealing be required, an instrument unsigned will not be valid although sealed (*b*). If notice is required to be given, the execution of the power will be void if notice be not given accordingly (*c*). And so in every case that the ingenuity of man can devise the terms of the power must be complied with.

But where the appointment is to a charity, any writing, however informal as an execution of the power, is good as an appointment within the statute of charitable uses (*d*); for this statute supplies all defects of assurance which the donor was capable of making (*e*). The intent of the statute, it has been said, was to make the disposition of the party as free and easy as his mind, and not to oblige him to the observance of any forms or ceremony (*f*). By an act of George the Second (*g*), gifts to charitable uses are required to be made by deed, indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve months at least before

(*b*) Thayer *v.* Thayer, Palm. 112; Blockvill *v.* Ascot, 2 Eq. Ca. Abr. 659, side note.
(*c*) Ward *v.* Lenthal, 1 Sid. 143.
(*d*) 43 Eliz. c. 4; Piggot *v.* Penrice, Com. 250, Prec. Cha. 471.
(*e*) Attorney-General *v.* Burdet, 2 Vern. 755.
(*f*) Attorney-General *v.* Rye, 2 Vern. 453.
(*g*) 9 Geo. II. c. 36.

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v. Evans, 1 Wils. 313; Grayson *v.* Atkinson, 2 Ves. 454; Ellis *v.* Smith, 1 Dick. 225, 1 Ves. jun. 11; see 2 Bla. Comm. 306; Dougl. 214, 2d edit; note, Dime *v.* Munday, Sid. 362, was before the statute). But, without question, if the point should ever call for a decision, it would, in conformity to the express words of the statute, and the general opinion of the profession, be holden, that sealing is not signing.

the death of the donor, and the deed must be enrolled in the Court of Chancery within six calendar months after it is executed. Now this act can no more be considered as a repeal of the statute of charitable uses, than the statute of frauds can of the statute of wills. And it, therefore, still seems, that if in an appointment, the solemnities imposed by the act of George the Second are attended to, the gift will operate as an appointment under the statute of charitable uses, although the instrument is not executed in the manner required by the instrument creating the power. But as the act of George applies as well to appointments under powers as to original conveyances, if the donee wish to appoint to charitable uses, although under the *power* he might appoint by a simple note in writing unattested, yet he must conform to the directions of the act.

But to return, the rule that every circumstance required to the execution of a power must be strictly attended to, is so clear and plain a rule, that we might here dismiss this part of our subject were there not many cases in which *particular expressions* imposing restraints on powers, or modes of executing them, have received a judicial exposition. I proceed, therefore, to consider these cases in the order before proposed; and although the courts cannot *dispense* with the form prescribed, yet we shall find that they in general incline to put a liberal construction on the words of the power.

And first as to the instrument.—If a *deed* is expressly required, the power cannot be executed by will.

This

This was decided by Sir Joseph Jekyll in the case of Woodward *v.* Halsey (*h*) (1), in which a power of revocation by *deed* sealed and delivered was holden not to be well executed by a will, although sealed and delivered. And the decree was affirmed by Lord Chancellor King, who said, that *factum* was a technical word, and as well known in the law as a fine or recovery, and that a will could not be a deed. The same point was decided in the case of the Earl of Darlington *v.* Pulteney (*i*), in which the former case was not cited. Lord Mansfield took up the question in the same way. He said, that the power was emphatically reserved to be executed by "deed." Now, the word deed, in the understanding of law, has a technical signification to which a will is in no respect applicable. This opinion was given upon a

(*h*) Rolls, Feb. 1727, MS.

(*i*) Cowp. 260, confirmed by Doe *v.* Lady Cavan, 5 Term Rep. 567, 6 Bro. P. C. by Toml. 175; and see Bushell *v.* Bushell, 1 Rep. Temp. Redesdale, 96.

(1) According to the Register's book the power was, "by any deed or deeds in writing, under his hand and seal, and sealed and delivered by him in the presence of three or more credible witnesses, to revoke, make void, alter, or change, any of the uses, &c. therein limited; and by the same deed or deeds, or any other deed or deeds, in writing, under his hand and seal, and by him sealed and delivered in the presence of three or more credible witnesses, to limit new uses." It is said in Mose. 46, that the Master of the Rolls held the will to be a revocation, but the Register's book, in this respect, agrees with the above note; Reg. Lib. B. 1727, fo. 212. Upon the appeal to the Chancellor, he directed the point to be tried at law in an action of ejectment, Reg. Lib. B. 1727, fo. 353. In the next year, upon the plaintiff's petition, this order was directed to be entered, Reg. Lib. B. 1728, fo. 454. I searched to the end of the year 1731, without meeting with any further trace of the cause.

case sent out of the Court of Chancery, and Lord Chancellor Bathurst decreed, according to the certificate of the Court of King's Bench, that the power was not well executed.

And the converse of the foregoing proposition holds equally true: a power to be executed by *will* cannot be executed by any act *to take effect in the life time of the donee of the power*. This was laid down by Lord Hardwicke in the case of Whaley *v.* Drummond (*k*). He said, that where a power is given to charge an estate by will, the person having the power cannot execute it by any act in his life time. But the mere circumstance of the estate being limited to A for life, and "after his death," or "then" to be at his disposal, will not, by implication, restrain the execution of the power to a will (*l*).

And, in favour of the intention, a settlement to the use of a man's will might, perhaps, be construed to mean not simply a disposition by testament, but any disposition by deed or otherwise. This question arose in the reign of James the First, upon a dispute between the Earls of Ormond and Desmond, who bound themselves in a penalty of 100,000*l.* each to abide by the King's award. The case was simply this: The then late Earl of Ormond suffered a recovery of certain estates *to the use of his last will*. By writing, under his hand and seal, he declared that the recoverors should stand seised to certain uses. The question was, whether he could revoke the uses. The case was referred to the two

(*k*) Ch. Easter Term, 1745, MS. Reg. Lib. B. 1744, fo. 150; see Reid *v.* Shergold, 10 Ves. jun. 370.

(*l*) Anon. 3 Leo. 71; Thomlinson *v.* Dighton, 1 Com. 194, 1 P. Wms. 149.

Chiefs,

Chiefs, Montague and Hobart, and Justice Dodridge. They all agreed, that the fee resulted to the Earl in the mean time. And Montague appears to have thought that the settlement took effect out of his interest, and not as an execution of his power; and he accordingly held, that it was not revocable. Hobart and Dodridge on the contrary held, that the instrument operated as an execution of the power, and that the uses were always revocable, because they were grounded upon the recovery which was to the use of his will, which was always subject to change. Secondly, they held, that the recoverors were seised to the use of his last will, *which was not to be understood a testament only, but to be extended unto any other voluntary disposition or gratuity whatsoever.* However, upon this difference of opinion, the King took the opinion of some of the other Judges, who agreed with Montague, and so the point in question was not decided (*m*).

The point in the foregoing case is not likely to arise at this day, as uses are generally declared in a more formal manner. And it is clearly distinguishable from a power to appoint *by* will; for in this case the word "will" evidently points to the instrument, whilst in that the declaration to the use of the Earl's will, was considered to mean rather the mind of the donee than the instrument by which his intention was to be expressed. But, if it should be so considered, yet as the law now stands, unless the execution was testamentary, it should seem that it could not be revoked without an express power reserved.

(*m*) Earl of Ormond's case, Hob. 348; see 3 Cha. Ca. 64, 100; and Shepherd v. Spencer, 1 Keb. 821.

However, it is clear, that even where a power is required to be executed by "the will," or, "last will and testament" of the donee of the power, an instrument, although sealed and delivered as a deed, will, if testamentary in its nature, be a good execution of the power.

Thus, in a case in Dyer (*n*), where the uses of a recovery were declared to be, to perform the will of the person who suffered the recovery, he executed the power by a deed indented and sealed: the question was, whether he could change the uses. Dyer and other Judges held, that he might well alter his will, for the deed was *quasi* a will, which is changeable. In this case, therefore, the point was taken for granted. Lord Chief Justice Treby, in adverting to the case, said, that the instrument was a will, for though it were in the form of an indenture between several parties, yet when he says he wills so and so, after he had recited a power to declare by will, this must be taken for a will, or it is no execution of the power (*o*). And it is now well settled by a series of decisions, that if the instrument executing the power is in its nature testamentary, the mere circumstance of its being in the form of a deed upon stamps, and sealed and delivered in the usual way as a deed, will not prevent it operating as a will (*p*).

More in his celebrated argument in Lord Buckhurst's case (*q*), cites Lord Awdley's case in a manner which has induced an inference, that a power to be executed by

(*n*) Anonymous, Dyer 314 a. pl. 97.

(*o*) See 3 Cha. Ca. 86; and see ib. 64.

(*p*) Hixon *v.* Wytham, 1 Cha. Ca. 248; Green *v.* Proude, 1 Mod. 117; Habergham *v.* Vincent, 2 Ves. jun. 204; and see Devereux *v.* Moor, 1 Keb. 697; Trimmer *v.* Jackson, 4 Burn's Eccle. Law, p. 130 cited.

(*q*) Mo. 515, 516.

will

will cannot be exercised by an instrument in the shape of a deed. The case is reported in Dyer (*r*), and in Leonard (*s*). A recovery was suffered by Lord Awdley to the use that the recoverors should perform his will; he afterwards, by deed, directed them to stand seised to certain uses, amongst others, to make an estate to him and his wife in tail. And it was determined, after great consideration, that the use was not changed, for this could not be his will to take effect by his death, *because it appeared the estate was to be executed in his life time.* Lord Awdley's case, therefore, merely proves what has been already stated, that the act must be testamentary, or the execution of the power is void.

Where a person is tenant for life, with a power to appoint the inheritance by *will* only, and is desirous to sell the fee simple, he may convey to the purchaser for a long term depending on his life, and exercise the power in the purchaser's favour by will, and covenant not to revoke it. The title of course will be incomplete during the vendor's life, as he may choose to revoke the will, and drive the purchaser to his remedy under the covenant: so he may revoke the will by a clandestine act, and leave no assets to answer the breach of covenant. But if a purchaser be willing to incur the risk, no objection can be raised to the execution of the power should it ultimately take effect. It is a mistake to call it an execution by deed, for the donee has still full power to revoke the will: the performance of the covenant cannot be enforced, but damages only can be recovered for a breach of it.

Although a will is not a good execution of a power to

(*r*) 166 a, 324 b, pl. 37. (*s*) 2 Leo. 159, 4 Leo. 166, 210.

be

be executed by a *deed*, yet where, in the instrument creating the power, words are thrown in of a general comprehensive sense, as "writing," or "instrument," the court will take advantage of them in favour of the intention, and deem a will within the meaning of the power although in vulgar acceptation, the words point to a deed. This was admitted by Lord Mansfield in Lord Darlington's case.

The leading case on this point is Kibbet and Lee, reported by Lord Chief Justice Hobart. There a power of revocation in a settlement was required to be executed "by writing under his hand and seal, and by him delivered in the presence of three credible witnesses," and *then, and from thenceforth,* the uses should be void. The donee of the power revoked the settlement by *will* under his hand and seal, and by him delivered in the presence of four witnesses. Hutton, Justice, held, that the words were to be understood of a deed according to vulgar speech, and the rather, because in such clauses the last will is especially mentioned; but Hobart, Chief Justice, Warburton, and Winch, Justices, determined that the will was good, because the revocation was to be taken liberally, and the execution of it favourably; and they held, that if the words "then, and from thenceforth," were repugnant, they were surplusage, and of no force (*t*).

This doctrine was carried to its utmost extent in a leading case in the House of Lords (*u*). The power was to revoke by *any writing* under the hand and seal of the

(*t*) Hob. 312; S. C. Litt. Rep. 218, cited, nom. Hubbard's case; and see ib. p. 111; and see Tylley *v.* Peirce, Cro. Car. 376.

(*u*) Countess of Roscommon *v.* Fowke, 4 Bro. P. C. 523.

donee,

donee, attested by two or more credible witnesses; and by the *same, or any other deed,* to limit new uses. This power was exercised by will in writing under the donee's hand and seal, and attested by the proper number of witnesses. And in favour of the execution of the power it was insisted, that to confine the execution of the power, as if designed to be by deed only, by reason of the latter words in the proviso [*by the same, or any other deed*], and to infer from thence, that the *writing* expressly mentioned in the former part of the power, and referred to even in this latter branch of it, must be *only* such a writing as was in point of law a *deed,* would be to make a construction of the power directly contrary to the former part, which enabled her to revoke the old uses *by any writing,* as well as to the latter part of it, which enabled her to appoint new uses by the same [*writing*], and would be to defeat and take away the operation of plain and clear words by implication and inference only. And the Judges delivered their opinion, that *this writing* was a good execution of the power; and a decree was made accordingly. The power, therefore, was read as if it had expressed, that new uses might be limited by the same [writing], or any other deed.

Nor will the circumstance of the power being given to two, and the survivor of them, vary the construction in regard to the survivor's right to appoint by will, although the power could not have been executed by will during the joint lives of the parties (*x*).

In treating of the instrument by which a power may be exercised, it is necessary to consider in what cases the power, although in one clause, gives distinct authorities.

(*x*) Burnet *v.* Mann, 1 Ves. 157.

In

In the case of Fitzgerald and Fauconberge (*y*), a settlement was made by Fowler, and the recital expressed the intention of the settlor to reserve power to himself to alienate the estate, &c. and in the deed was a proviso that the settlor might grant, sell, or demise the estate at his pleasure, *or* by any deed or writing under his hand and seal, &c. revoke the old uses and declare new ones, and several particular powers were given to him, to the execution of which witnesses, &c. were required. Fowler afterwards conveyed the estate without observing the solemnities required by the latter part of the first proviso. And it was, after great consideration, determined by the Lord Chancellor, the Master of the Rolls, and Reynolds, Chief Baron, that Fowler had under the proviso two distinct powers, one to sell the estate without observing any formalities, the other to revoke and declare new uses in the manner required by the latter part of the power. The decree was, after a hearing of four days, confirmed by the House of Lords, upon the opinion of six Judges against Mr. Justice Fortescue (*z*). The Judges delivered their opinions *seriatim* (*a*); and, notwithstanding the opinion of the majority of the Judges, it was (as appears by the manuscript account of the judgment indorsed on the printed (*b*) cases) moved to reverse the decree; but upon the question being put, the motion was negatived by 22 against 13.

This was certainly a very particular case, but it may be considered an authority to this extent, that where two powers are given in the same clause, both enabling the same act, and the second power is introduced by the dis-

(*y*) Fitzg. 207.
(*z*) 3 Bro. P. C. 543.
(*a*) See Journ. Dom. Proc. vol. 18, p. 624.
(*b*) See printed cases, Dom. Proc. 1730, c. 42.

junctive

junctive conjunction "or"; and the circumstances required to the execution of the power are in the latter part of the proviso, and do not expressly refer to the former part; the powers are distinct, and the first may be exercised by even a simple note in writing unattested. It is evident, that upon principle, the case is much stronger where the words of the clause authorize *distinct* acts; as where the first is to jointure, and the second to revoke the uses. It was one circumstance, perhaps, in the above case in favour of the construction which the proviso received, that the solemnities *preceded* what was deemed the second and a distinct power. The case would have been less strong had the solemnities imposed been inserted at the latter end of the entire proviso.

And here we may notice a case where the proviso was, that the donee might by his own proper hand writing, to be written or indorsed on the indenture, revoke the uses therein, and the court denied that the revocation ought to be by writing on the indenture, and held, that it might be by other writings as well as indorsement (*c*). There appears, however, to have been considerable difficulty in the way of this decision.

But where only one power is given, and it is authorized to be executed by different instruments, although the ceremonies required to the execution are not stated after each instrument, yet they will relate to both instruments. This is the case of Dormer and Thurland (*d*). There a power was given to be executed "by his last will, or any writing purporting to be his last will, under his hand and seal, attested by three or more credible witnesses." The power was exercised by a will duly

(*c*) Lestrange *v.* Temple, 1 Keb. 357.

(*d*) 2 P. Wms. 506; see Jones *v.* Clough, 2 Ves. 365.

executed

executed according to the statute of frauds, but it was not *sealed*. Lord Chancellor King held, that the will was a good one, the power being in the disjunctive; but a case was referred to the Judges of the King's Bench, who determined that the will was void as a charge, for want of being sealed, and consequently that the power was not in the disjunctive. Lord Mansfield, in adverting to this case (*e*), said, that "Lord King was of opinion that it was a good execution of the power, because by *will*, and I own I should incline to that opinion." But as we have seen, the question was, whether the will ought not to have been sealed; for if the power required that solemnity, the power being executed by *will*, could not vary the case. In the case of Ross and Ewer (*f*), the case of Dormer and Thurland was recognised and acted upon as an authority. The power in this last case was to appoint "by her last will and testament in writing, or other writing, under hand and seal, to be attested by two or more credible witnesses." And Lord Hardwicke held, that the latter words in the clause "under her hand," &c. were referable as well to the will as to the other writing. However, in the case of Doe *v.* Morgan (*g*), where the power was to appoint "by deed, or will, signed in the presence of three witnesses," it was not necessary to decide the point, and the cases bearing upon it were not cited; but Lord Kenyon, Chief Justice, in delivering judgment said, that if it were material to decide that point, he should think that an appointment by *deed* would have been good, though not executed in the presence

(*e*) Cowp. 268. (*f*) 3 Atk. 156. (*g*) 7 Term Rep. 103.

of

of three witnesses, and that that number of witnesses only applied to an appointment by will. The distinction between the cases of Dormer and Thurland, and Ross and Ewer, and the case of Doe and Morgan, is this: In those cases the *will* was the first instrument referred to, and it was a reasonable presumption that the three witnesses were intended to be required to the execution of the will; but in Doe v. Morgan, the *deed* was the first instrument mentioned, and the solemnity of three witnesses is not often imposed on an execution by deed, and the words in that case were satisfied by referring to the will which *immediately* preceded them. It was probably on these grounds that Lord Kenyon delivered the *obiter* opinion alluded to, but the distinction thus attempted to be established, is too refined to be relied upon in practice.

In Hardin v. Warner, where the power was to revoke upon tender of a gold ring, or a pair of gloves of 12d. price, or 12d. in money, it was held that the price of 12d. extended to the gloves only (*h*), on the ground, it seems, that it could not be presumed that a ring is of so small a value as 12d. for it imports value in itself (*i*).

We may here observe, that where several modes of executing a power are stated, the donee may, in the absence of a direction to the contrary, execute it in which of the ways he please. Thus, where a power was, that the wife might make a will in the presence of the husband, unless he refused, or in the presence of J. S., or two such persons as she should appoint, it was determined to be in the wife's election to execute in which of the three ways she chose (*k*). And yet cer-

(*h*) Noy 79; see 1 Jones 134; Palm. 429; 2 Roll Rep. 293.

(*i*) Palm. 431.

(*k*) Harris v. Bessie, 1 Keb. 348.

tainly

tainly the power seems to have implied, that the wife should not execute in the presence of J. S., or the other persons, unless her husband refused to permit her to execute in his presence.

We shall hereafter see that a person executing a power may declare, that it shall not take effect till a certain act is done. Upon this principle a power given to be executed by a single instrument as a deed, may be executed by several assurances, for where the instrument is executed with the formalities required by the power, and refers to some future act to be done to complete the execution of the power, as a fine to be levied, neither the deed nor the fine by *itself* can operate as an appointment; not the deed, because that would be contrary to the intention of the person executing it, and certainly not the fine, as that would be contrary to the words of the power; yet taken both together, the power will be duly executed: *quæ non valent singula, juncta prosunt*. This is the Earl of Leicester's case before noticed (*l*). And on the same principle it is, that a fine first levied, and then a deed declaring the uses of it, will be deemed an execution of the power, where the deed is executed in the manner required by the power. This we have seen was decided in the case of Herring and Brown (*m*). It is, however, to be observed, that this case did not decide, that a declaration of uses at any time after the fine, will prevent the forfeiture, and operate as an execution of the power. Indeed, Mr. Justice Withers, who was the only judge of the King's Bench that held the power was not de-

(*l*) *Vide supra*, page 68.

(*m*) *Sup.* p. 69; and see Snape *v.* Turton, Cro. Car. 472; and see 2 Freem. 118.

stroyed,

stroyed, expressly said, that "the fine and deed should be considered as one conveyance in favour of common assurances, *where the distance of time is not apparently long.*" Where it is recited in the deed, that the fine was, at the time of levying thereof, intended to enure to the uses expressed, it seems that no party to the deed, nor any one claiming under him, can insist upon the forfeiture, as the deed would operate as an estoppel. But as against strangers, it is conceived, that it would be left to a jury to say, whether the fine was or was not levied to the uses subsequently declared. This observation has been already made (*n*).

Both in the Earl of Leicester's case, and Herring and Brown, the deed and fine were considered as one assurance, and such was the intention of the parties (*o*). The principle of these cases cannot be applied to a case where there is first a *defective* execution of a power, and then a further execution, which is also defective, but which was intended to be a complete and valid execution, although in the *two* instruments taken conjointly, the directions of the power are strictly complied with. This was decided in the case of Hawkins and Kemp (*p*). There the deed executing the power was required to be inrolled, and a deed was accordingly executed and duly inrolled, but was a defective execution of the power in other respects; a further deed was then prepared, by which, after reciting that doubts had arisen as to the former execution, the power was duly executed. In the body of the last deed, the intention

(*n*) *Sup.* p. 69.

(*p*) 3 East 410.

(*o*) See Doe *v.* Whitehead, 2 Burr. 704; Hurd *v.* Fletcher, Dougl. 45.

to inrol it, was stated, but it never was actually inrolled. It was insisted that the two deeds together operated as an execution of the power, but Lord Ellenborough, in delivering the opinion of the court, said, that in this case *there was no intent that the two deeds conjointly should revoke the uses,* and that the inrollment of the first should be applied to, or be in any way connected with the second. On the contrary, the last deed in the body of it takes notice of the inrollment, as an act *to be done* in respect of the *then executing deed,* thereby not only adverting to the *necessity* of actual inrollment, but *virtually* disclaiming the benefit, (if indeed in any shape such benefit could have been derived from it) of the inrollment of the former inefficacious deed of revocation and appointment.

It was sufficient for the determination of the court, in the preceding case, to shew that the parties did not intend the deeds to operate as one assurance. But it is evident that the court considered it doubtful whether *in any shape,* they could be so construed. And the better opinion is, that they could not, for the distinction appears to be, that for several instruments to constitute one assurance, such must be the intention of the parties at the perfecting of the *first* assurance, and that an intention to refer a subsequent assurance to a prior one, where such intention did not exist at the execution of the first assurance, will not be effectual. Thus, in Seymour's case *(q),* where a tenant in tail conveyed by bargain and sale, and afterwards levied a fine to the bargainee, it was determined that the fine did not work a discontinuance, because it did not appear that any fine

(q) 10 Rep. 95.

was

was *intended* to be levied at the time of making the bargain and sale; whilst, on the contrary, in Doe v. Whitehead (*r*), where there was a covenant in a release from a tenant in tail, to levy a fine to the use of the releasee, the fine and release were holden to be but *one* assurance; and that consequently this operated as a discontinuance. The same principles appear to apply to the case under consideration.

II. I come now to consider the mode in which the instrument is required to be executed. It has already been observed, that in general every circumstance required to attend the execution of the instrument, must be duly complied with. But there are few cases in which the courts require any thing beyond the strict letter of the power; therefore, where a writing under hand and seal is required, it need not be delivered (*s*), although writings signed and sealed are usually delivered also: so where the deed is required to be *duly* attested, an attestation by one witness will satisfy the words (*t*).

The mode in which the instrument is to be executed is mostly expressed, but sometimes implied: expressed, as that it shall be signed in the presence of two witnesses; implied, as where a power is given to appoint an estate generally by deed or will, without defining the manner in which it is to be executed, or even expressing that it shall be duly or legally executed, it is implied that the deed or will shall be executed in the

(*r*) 2 Burr. 704.
(*s*) Carter v. Carter, Mose. 369.
(*t*) Poulson v. Wellington, 2 P. Wms. 533.

manner prescribed for the execution of deeds and wills by the common and statute law. Therefore, if the power be executed by deed, it must have a seal, as that is of the very essence of a deed. If the instrument be a will, and the subject of the power be personal estate, it may be executed by a mere paper writing, without signature or attestation, in like manner as a proper will of personalty; and even if it be required to be duly executed, yet it should seem that there need not be any witness to it (*u*). So, if the property be real estate, the will must be executed with the solemnities required by the statute of frauds, as it is within all the inconveniencies of the statute. And the case is stronger where it is required to be *duly* executed, as the donor must be understood to have referred to some known rule, which, as he himself has mentioned none, can be no other than the rule of law, and that the statute of frauds has furnished us with (*x*). However, the law is clear in both cases, and the same rule applies where the power is given to be executed by "any writing in the nature of a will," as those words mean the same as a will (*y*).

But the case of Jones and Clough, before Sir John Strange, is considered as an exception to this rule: the decision in effect is, that where a person *creates* a charge on his estate, but gives another person the power of appointing it, although the power is re-

(*u*) See 2 Ves. 367.

(*x*) Per Lord Hardwicke, 9 Mod. 485.

(*y*) Longford *v.* Eyre, 1 P. Wms. 740; Casson *v.* Dade, 1 Bro. C. C. 99; Duff *v.* Dalzell, 1 Bro. C. C. 147; and see Wagstaff *v.* Wagstaff, 2 P. Wms. 258; Wilkie *v.* Holmes, 9 Mod. 485, 1 Dick. 165, 1 Rep. Temp. Redesdale, 60 n.; Jones *v.* Clough, 2 Ves. 365.

quired

quired to be executed by will *duly executed*, yet it need not be executed in the manner prescribed by the statute of frauds (1). This distinction, however, would, if adhered to, be in many cases very refined, as in no case does a will executing a power operate as a proper will, but merely as a direction of the use, and the estate passes by force of the instrument under which the power was created. This will be explained hereafter. The case before Sir John Strange was a case of compassion, and it is not easy to discover whether he founded his decree on the ground of the power being duly executed, or of its being a proper case for equity to aid the defective execution of the power.

However, where the power embraces both real and personal estate, and is, according to the requisition of the power, executed by will, although the will is not executed in the manner required by the statute of frauds, yet it will be a good appointment so far as it relates to the personalty (*z*)

Of the *effect* of a *will* executed under a power, I shall hereafter have occasion to speak.

(*z*) Duff *v.* Dalzell, 1 Bro. C. C. 147.

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(1) According to Lib. Reg. this was a very particular case. By the agreement which gave the power, the parties contemplated that the security for the money was to be raised not by the will, but by *trustees*, who were by the agreement empowered (according to the words of the instrument) to grant, mortgage, lease, set, or otherwise dispose of the estate to any person for raising the money. The money had been actually advanced by a mortgagee, who had a subsisting legal term. The point in the text was not raised by the answer, nor does it appear upon what ground the case was decided. Reg. Lib. A. 1750, fo. 624.

In Sprange *v.* Barnard (*a*), a feme covert had a power of appointment over personalty by *will*, to which by the words of the power a *seal* was required (1). She first wrote her will on unstamped paper, and then thinking it to be material that her will should be upon stamps, she wrote it on stamped paper, and afterwards fixed the two papers together with a wafer, and had it witnessed according to the power. And Lord Kenyon, then Master of the Rolls, held the stamp to be equivalent to a seal, without having, he said, recourse to the wafer, which annexed the stamped paper to the former. It may, however, be doubted whether either the stamp or the wafer could consistently be deemed a seal within the meaning of the power. The stamp is a mere regulation of the revenue to prevent fraud; and it has been very properly determined, that the revenue laws ought never to be held to operate beyond their direct and immediate purpose, to affect the property, and vary the rights of parties, not within the intention of the act (*b*). The wafer was merely to keep the two papers together. Neither the stamp nor the wafer was affixed with an intention to *seal* the will. Sealing is essential to a *deed*,

(*a*) 2 Bro. C. C. 585.

(*b*) Buckmaster *v.* Harrop, 7 Ves. jun. 345.

(1) This is according to Mr. Brown's report, and he could scarcely have inserted the words by mistake, but as the case stands in Lib. Reg. it was a power by any writing under her hand and seal, attested, &c. "or by her will in writing, or any writing purporting to be her will." No solemnities appear to have been required to the execution of the power by will. And if this were so, the question must have been, whether the ceremonies prescribed in the clause, applied to a will as well as a writing *inter vivos*. Reg. Lib. B. 1788. fo. 354.

and

and it is quite clear that neither the stamps on the parchment, nor the annexation of the deed by means of a wafer to another deed, would be equivalent to sealing. And when sealing is required to an instrument executing a power, it must be understood to mean such a sealing as is required, where a seal is by law essential. This is clearly proved by the cases before-mentioned as to the execution of wills. But sealing is a solemnity which by this decision may be completely evaded. The principle applies equally to a *deed* executing a power as to a will. Now the common law will not enquire into the consideration of a *deed*, because of the solemnity and deliberation with which it is perfected. For, first, there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of the deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and lastly, he delivers the writing as his deed, which is the consummation of his resolution (*c*). This shews the importance which the common law attaches to the ceremony of sealing. But it is not necessary that an impression should be made with wax, or with a wafer. If the seal, stick, or other instrument used, be impressed by the party on the plain parchment or paper, with an intent to seal it, it is clearly sufficient; and therefore where the instrument is a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper. This, I am told, Lord Eldon decided when in

(*c*) Plowd. 308.

the Common Pleas. But in Sprange and Barnard, Lord Kenyon rested his decision on the single circumstance of the deed being upon stamps.

Where signature is required, the mere incapacity of the donee to comply with the requisition, as where he has the gout in his hand, will not, it seems, excuse the non-performance of the condition (*d*); but where the donee cannot write, whether by reason of sickness or ignorance, it should seem that his mark would be equivalent to signing his name. This has been determined upon the statute of frauds, which requires the *witnesses* to wills of lands to attest and *subscribe* the will; yet it has been held that an attestation signed by a marksman is sufficient (*e*). And it seems equally clear that a mark by the testator himself would be equivalent to signing his name, although the statute expressly requires a signature. So it seems that a man may stamp his name, which will be tantamount to a signature (*f*). And in a recent case upon the statute of frauds, Lord Eldon thought that if a man is in the habit of printing his name, instead of writing it, he may be said to *sign* by his printed name as well as his written name (*g*).

Where a power is required to be signed, or to be executed under the *hand* and seal of the donee, in the presence of and *attested* by witnesses, an instrument executed by him, in which the word "signed" is omitted in the attestation of the witnesses, has fre-

(*d*) Blockvill *v.* Ascott, 2 Eq. Ca. Abr. 659.

(*e*) Harrison *v.* Harrison; Addy *v.* Grix, 8 Ves. jun. 185, 504; and see Lemaine *v.* Staneley, 1 Freem. 538; and Hudson's case, Skin. 79.

(*f*) See Lemaine *v.* Staneley, *ubi sup.*

(*g*) Saunderson *v.* Jackson, 2 Bos. and Pull. 239.

quently

quently been considered in practice as an invalid execution of the power, although the instrument is actually signed and sealed by the party who is required to execute it.

They who contend that the omission is fatal, insist that evidence cannot be received to establish the fact of signature, and that a jury cannot presume that the deed was signed in the presence of the witnesses, when from the attestation itself it appears to have been only sealed and delivered in their presence. And that it might be presumed that the deed was only sealed and delivered in the presence of the witnesses, and was afterwards signed in their absence.

The construction which the statute of frauds has received, appears to bear strongly on this point. By that statute it is enacted, that all devises shall be in writing, and signed by the testator, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses. These words are very forcible, for as the attestation and subscription are required to be made by the witnesses in the presence of the devisor, it was clearly intended that the will should be signed by him in their presence, and the witnesses are expressly required to subscribe in the presence of the testator. It has, however, been decided, first, that the devisor need not sign in the presence of the witnesses (*h*); secondly, that the subscription of the witnesses to an attestation, which only contains the words "sealed and delivered by," &c. is sufficient (*i*); and, thirdly, it has

(*h*) Ellis *v.* Smith, 1 Ves. jun. 11; Addy *v.* Grix, 8 Ves. jun. 504; and see Dormer *v.* Thurland, 2 P. Wms. 506.

(*i*) Trimmer *v.* Jackson, 4 Burn's Eccl. Law, 130.

in

in three different cases (*h*) been holden, that although the fact of the subscription of the witnesses, in the presence of the testator, is omitted in the attestation; yet, if the witnesses be dead, and their hands proved in common form, it is evidence to be left to a jury, of a compliance with all the circumstances. And yet it was contended, that the hands of the witnesses could only stand to the facts they had subscribed to. Verdicts were given in favour of the wills; and, indeed, it seems clear, that in every case of this nature, free from any particular suspicion, a jury would find the solemnities adhered to.

From these decisions it may perhaps be inferred, that the subscription by the witnesses, of an attestation in which the word *signed* is omitted, is a sufficient compliance with the power. And that even should it be determined, that the donee of the power ought to have signed in the presence of the witnesses, yet evidence may be received of the signature having been made in their presence; and if the witnesses are dead, and the transaction fair, a jury would be directed to find in favour of the instrument having been duly executed. A very strong additional circumstance in support of such a verdict would be the fact, that nearly all deeds have no other attestation than "sealed and delivered;" and that the omission of the word "signed" is in every case clearly owing to inadvertence, and the frequent use of an attestation containing the words "sealed and delivered" only.

Since the above observations were written, a case

(*h*) Hands *v.* James, Com. 531; Croft *v.* Pawlet, 2 Stra. 1109; Brice *v.* Smith, Willes 1.

came

came before Lord Eldon, in which the deed executing the power was required to be signed; but it is not stated that the witnesses were required to attest the signature (1). *In the body of the deed actually executed, it was stated to be signed by the donee in the presence of the witnesses, according to the power.* In the attestation, however, the word "signed" was omitted. Lord Eldon said, that upon the question, whether after execution it ought to be taken that he did sign in the presence of the witnesses attesting the sealing and delivery, there would be a miscarriage in a judge directing a jury, if that fact was found, not to presume that the deed was signed in the presence of the same witnesses as it professed to be. That attestation, therefore, he added, was good (*l*).

And this, it is apprehended, may be done even after the death of the person executing the power. It does not seem open to the objection taken in the case of Hawkins and Kemp, to the inrolment of the deed after the death of Hawkins (*m*), for the signature was duly made; and if there was any error, it was merely in the form of the attestation, which perhaps in strictness need not have been indorsed. I have seen a title, where a power to three persons was required to be executed by deed, *signed*, sealed, and delivered by the parties, in the presence of, and attested by two witnesses. The attestation on the deed executing the power contained

(*l*) M'Queen *v.* Farquhar, 11 Ves. jun. 467.

(*m*) *Vide infra.*

(1) None of the points of law in the case appear in the Register's book. See Lib. B. 1804, fo. 1095.

the

the words *sealed and delivered*, &c. only. The title was objected to, by reason of the word "signed" having been omitted in the attestation. The late Mr. Holliday was the surviving witness. Two of the parties who executed the power were dead; and in order to obviate the objection, a bill was filed in Chancery, in Hil. T. 1800, to perpetuate his testimony as to the signature of the deed, which was actually signed in the presence of him and the other witness. The title has been since frequently accepted.

It is usual in powers to say, that they may be executed in the presence of a given number of witnesses, *or more*, but this is unnecessary, as no objection can be raised to the deed executing the power, although it is attested by a greater number of witnesses than was in strictness necessary.

It is clear that where an instrument executing a power is required to be executed in the presence of two or more witnesses, and nothing is said about their attesting the execution, the power will be duly executed, although the witnesses do not subscribe the attestation indorsed, or some of them do, and others do not. This was decided in the case of Sayle and Freeland (*n*). And by analogy to the decisions upon the statute of frauds, it should seem that in the absence of an express requisition, that the witnesses shall all attest the instrument at the same time, they may attest it at different times. (*o*).

(*n*) 2 Ventr. 355; 2 Ch. Rep. 110; 1 Eq. Ca. Abr. 345.

(*o*) Cook *v.* Parsons, Prec. Cha. 184; Lodge *v.* Jennings, Gilb. Eq. Rep. 255; Jones *v.* Lake, 2 Atk. 176 n.; Grayson *v.* Atkinson, 2 Ves. 454; Ellis *v.* Smith, 1 Ves. jun. 11; See 3 Cha. Ca. 82, 90.

Where

Where trusts are raised with a power of revocation in the settlor, the settlement will not be defeated by the mere act of the trustee re-conveying to the settlor; to effectuate a revocation, the terms of the power must be complied with, although the settlement was merely voluntary (*p*).

It is here material to observe, that, generally speaking, every formality required to the execution of the power, must be perfected in the life-time of the donee of the power, although it is external, or dehors the deed. Thus, in Hawkins *v.* Kemp, where the deed was required by the power to be enrolled, the deed in the body of it expressed that it was intended to be inrolled, but it was not inrolled till after his death. It was insisted that the inrollment would make the deed good by relation, and that there was nothing personal in it; but the court, in an elaborate judgment, held, that the inrollment could not be made against the consent of the donee of the power, and must of necessity be made during his life, as it was one of the circumstances required to the due execution of the power. The Lord Chief Justice observed, that the question was not so properly a question of *relation,* as whether *the inrollment could have any effect without the donee's authority,* which necessarily determined with his life (*q*).

III. I proceed to consider the conditions required not relating to the instrument.

Where a man has, under distinct settlements, distinct

(*p*) Ellison *v.* Ellison, 6 Ves. jun. 656.

(*q*) 3 East 410; and see Digges's case, 1 Rep. 173; *vide supra* p. 193.

powers

powers to appoint new uses, or to revoke the old uses, of two distinct estates, on tender upon each appointment or revocation of any given sum of money, as 5s. and he tender one sum of 5s. only, and then exercise both powers, the execution of both will be deemed void, although the two estates were settled to the same uses, and the tenders were to be made to the same persons (*r*); but it seems to have been thought, that where the powers require the performance of any other act than the payment of money, the performance of one single act would be sufficient (*s*). It is evident that no general rule can be laid down on this subject. If, indeed, a man have several distinct powers of revocation over different estates, upon riding to York, the performing the journey once may well extend to all the powers. But if the conditions were, that he should provide a gown for some poor woman, several distinct gifts would evidently be requisite; this, however, it may be said, is money's worth.

Where a tender of a sum of money is required to the valid execution of a power, it is highly desirable that the fact of the tender should be stated in the deed executing the power, and that the person to whom the tender is made should acknowledge it by indorsement on the deed; for although the fact *may* be proved by parol

(*r*) Gresham's case (1), Dy. 372 a. pl. 9, 1 Leon. 89, 9 Rep. 106 b. Mo. 261. (*s*) See Dy. 372 b.

(1) This case is differently stated in Moore. It is there stated that each of the powers required a tender of 10s. and that the donee actually tendered 20s. but the doubt was, whether a tender of the two sums in one entire sum would do. Dyer, Leonard, and Coke, however, state the case as in the text.

evidence,

evidence, yet in some cases it might be difficult to establish it to the satisfaction of a jury (*t*). The practice, however, of requiring money to be tendered, is now become obsolete, but the observation applies with equal force to every other external circumstance required to the execution of a power.

Although money is required to be tendered *at a particular place*, yet a tender in the absence of the person to whom it ought to be made, and without notice having been given to him of the time when the tender would be made is void (*u*). But where a certain place and day is limited for the tender, the person to whom it is to be made, must attend at his peril (*x*). Where no time is limited, notice ought to be given to the person by whom the tender is to be received, that it will be made at such a time, and he should be required to be there to receive it; and then, if at the time appointed a tender be made, although he absent himself, it is a good performance of the proviso (*y*).

But although the tender is required to be made at a given place, yet it seems that a tender *at any other place*, and an acceptance of it by the person to whom it is to be made, will be valid even at law (*z*), unless the tender is to be made to a stranger, and not to a privy to the deed; in which case it seems that the strict letter of the condition must be complied with (*a*).

Where a tender is required to be made to a man or his heirs, if he die, leaving an infant heir, the tender

(*t*) See Arundel *v.* Philpot, 3 Cha. Ca. 70, 108 cited, 2 Vern. 69.
(*u*) Lady Burg's case, Mo. 602.
(*x*) Burrough's case, Dy. 354, a pl. 32; and see 3 Cha. Ca. 67.
(*y*) 8 Rep. 92 b.
(*z*) Thorne *v.* Newman, 2 Cha. Rep. 37; and see 3 Cha. Ca. 68, 108.
(*a*) See 3 Cha. Ca. 68.

may

may be made to the infant, of whatever age he may be. And although the infant be a female, and the wife of the deceased be ensient at her husband's death, and should afterwards be delivered of a son, yet that will not invalidate the prior tender to the daughter, who was heir *pro tempore*. Where the tender is required to be made to a man or his *assigns*, and the estate is limited to him and his *heirs*, the heir is the proper person to receive the tender. These three points appear to have been decided by Allen's case in *Curia wardorum*, in the 11th of Jac. I. (*b*)

Where the consent of any person is required to the execution of the power, that, like every other condition, must be strictly complied with (*c*).

And if the person whose consent is essential, die before the execution of the power, and without having assented, the power is gone, although his death was the act of God (*d*). So where the consent of several persons is required, the death of one of them destroys the power, as the consent of the survivors will not satisfy the words of the power (*e*). But the intention of the parties will be observed, however informally it be expressed. Therefore, where a power of revocation was given in a marriage settlement to two persons, with the consent of their wives, if they or either of them were then living, a revocation, with the consent of the surviving wife, was held sufficient, al-

(*b*) Ley 57.

(*c*) Simpson *v.* Hornsby, Prec. Cha. 452.

(*d*) Danne *v.* Annas, Dy. 219, pl. 8; and see Mansell *v.* Mansell, Wilm. 36.

(*e*) Atwaters *v.* Birt, Cro. Eliz. 856; S. C. Noy 38, nom. Alwaters *v.* Bird; *vide supra*, ch. 3, sect. 2.

though

though the power did not expressly say that the consent of the survivor should be valid (*f*). And in one case, where a father by his will gave a power of jointuring to an improvident son, *with the consent of his trustees*, both of whom were of an advanced age, the court appears to have been of opinion, that in favour of the intention, the consent of the heirs of the trustees would be valid; and that the will was to be read as if he said, "with the consent of the trustees *and their heirs*;" and as the persons were several, and the consent was personal, they thought the expression would be equivalent to saying, "With consent of both while they live, but when one die, that consent shall devolve upon his heir: the heir of the dead trustee shall consent, as well as the surviving trustee: one may abuse the power; I will supply the loss of one by his heirs, and the loss of both by the heirs of both (*g*)." It was not, however, necessary to decide either of these points.

In Lord Mordant *v.* the Earl of Peterborough (*h*), the Earl had a power of revocation, with the consent of the Countess in writing. She was a party to the deed, which was necessary in order to save her jointure, and she sealed it; but the conveyance was not said to be by her assent, nor was any mention made of it in any other clause; and the court conceived this not to be a sufficient revocation. The point, however, did not call for a decision, but this case enforces the necessity of stating accurately in the deed executing the

(*f*) Savil *v.* Sterling, Shep. Touch. 526; S. C. 2 Ro. 178, nom. Gardner *v.* Savill.

(*g*) Mansell *v.* Mansell, Wilm. 36; and see Hewit *v.* Hewit, Ambl. 508.

(*h*) 3 Keb. 305.

power, the compliance with every circumstance imposed on the execution of it.

Where a person's consent is required to the execution of a power, he cannot delegate the confidence reposed in him. This was one of the points in the case of Hawkins and Kemp (*i*). The power was to be executed with the consent of several persons. One of these persons being abroad, gave a letter of attorney to the donee of the power, to consent to his own revocation of the power. And this part of the case was abandoned, as the court intimated a decided opinion against it, on the ground that it would operate as a total destruction of the check intended by requiring the *personal* approbation of the trustees.

It appears scarcely necessary to observe, that when a trustee is authorized to consent to a revocation, he will not be guilty of a breach of trust by giving his consent accordingly, unless he act fraudently (*k*); nor will a court of equity controul his discretion. Thus where in a marriage settlement it was provided, that if the husband, his heirs, executors, or administrators, with approbation and good liking of two trustees, should settle lands of 80l. per annum to the same uses, then that settlement should be void: the eldest son and heir applied to the trustees to consent, that on settlement of an estate of equal value, the former should be void; the trustees would not consent; without which the revocation would not be good in point of law: a bill was brought to compel their consent, and Lord Hardwicke held that it could not be done, and that a bill of that

(*i*) 3 East, 410.

(*k*) Reresby *v.* Newland, 2 P. Wms. 93.

kind

kind against trustees who had a discretionary power to consent or not was never admitted (*l*).

We may close these observations upon consent, with the case of Hutcheson *v.* Hammond (*m*), where a testatrix gave a fund to A for life, and after his decease to his daughter, and willed that if she *in the life-time of her father* should marry without his consent, then he should have a power to appoint the fund to whom he pleased; the daughter married in her father's life-time *with his consent*, and it was determined that by this one consent the power was wholly gone.

We have still to consider those cases where the conditions imposed, although like the former not relating to the instrument, are yet in many respects distinguishable from them. I allude to powers to be exercised only in the event of another estate proving deficient to answer certain charges, or another estate being first settled to the same uses, or the like. And as these conditions consist not merely of form, but are of the very essence of the gift or reservation, they perhaps more than any other require a strictly literal performance.

Therefore, where a power was given to trustees to sell for the purpose of raising as much money, as the personal estate should prove deficient in paying debts, it was decided by Jones, Croke, and Barkeley, Justices, that the condition was a precedent condition, and that the power would not authorize a sale unless there was an actual deficiency, and then so much only of the estate could be sold as was sufficient for the payment of the debts, and consequently that the amount of the debts,

(*l*) Brereton *v.* Brereton, 2 Ves. 87 cited.

(*m*) 3 Bro. C. C. 128.

and the value of the personal estate ought to be shown, so that the court might judge whether the condition was performed or not (*n*). Great difficulty frequently arises in practice from powers like this, as it is difficult to satisfy a purchaser of the deficiency, and the actual extent of it. It should, therefore, in these cases invariably be provided, that the power shall *quoad* a purchaser be well executed, although there be no deficiency, and that he shall not be bound to enquire into or ascertain whether there actually be any deficiency (*o*).

So where a power of sale was given to trustees, *so as that* (*p*) the money was paid them, and laid out in other lands to the like uses, it was held that the power was not well executed, as the money was not paid to the trustees, and laid out accordingly (*q*). The court considered that the trustees had only a power of sale, *on condition* of reinvesting the money in the purchase of another estate. In this case, however, the purchaser's agent was privy to a fraudulent disposition of the purchase-money, and knew that it was not intended to lay out the purchase-money according to the proviso. Where the transaction is fair, and a power is given by the settlement to the trustees, to give receipts for the purchase-money, which are declared to be discharges; it seems clear that the purchaser could not be affected

(*n*) Dike *v.* Ricks, Cro. Car. 335, Wm. Jones, 327, 1 Ro.Abr.329, pl. 9, 3 Vin. Abr. 419, pl. 9; and see Popham *v.* Hobert, 1 Cha. Ca. 280; and Culpepper *v.* Aston, 2 Cha. Ca. 115, 221, as explained, Treat. Purch. 2d Edit. p. 343; and see Bowman *v.* Mathews, For. Exch. Rep. 163.

(*o*) See Treat. Purch. 2d Edit. p. 344.

(*p*) See Lord Chancellor Bacon's argument upon *ita quod*, or *so that* in powers. Sir John Stanhope's case, Bac. Law Tracts, 233.

(*q*) Doe *v.* Martin, 4 T. Rep. 39.

by

by a misapplication of the money, after having obtained a proper receipt for it, from the trustees. The opposite rule would in effect strike this clause out of the deed.

Again, where a power of revocation was given with the consent of trustees, *so that* at or before the revocation other estates were assured of equal or better value, to the like uses, it was considered clear, that if an *equitable* estate had been conveyed, the power would have been badly executed *at law*, but whether in equity was doubted; and it was also thought that a purchaser of the settled estates would have been bound to have shewn the value of the substituted estates (*r*).

And in a case where a power of revocation was given, *so as* at the time of such revocation he settled other lands free from incumbrances, of as good or better yearly value, Lord Hardwicke was clearly of opinion that the power of revocation was not well executed, as the substituted estate was not of equal value, and was charged with an incumbrance (*s*).

These cases should not be dismissed without an observation on the impolicy of the settlements upon which they arose; they tend only to expense and trouble in practice, as a purchaser could not in general be compelled to complete his purchase without the sanction of a decree in equity, and there are few cases in which he could be advised to accept the title without a decree. It would be much better wholly to omit a power of sale in a settlement than to fetter its operation by requisitions like these. The *usual* power of sale is exactly adapted

(*r*) Cox *v.* Chamberlain, 4 Ves. jun. 631. (*s*) Burgoigne *v.* Fox, 1 Atk. 575.

to effectuate the intention of the parties: the trustees are authorized, with the proper consents, to sell the estate absolutely, and are directed to lay out the money in the purchase of other estates; but this is not made a condition affecting the execution of the power, but on the contrary, the trustees are authorized to give receipts to the purchaser, which it is declared shall exonerate him from seeing to the application of the money; and they are empowered to lay out the money at interest, until invested in the purchase of an estate. This plan has been adopted from a conviction of the mischievous tendency of other modes.

SECTION IV.

OF THE TIME AT WHICH A POWER MAY BE EXECUTED, AND OF PARTIAL EXECUTIONS.

It comes in order to consider at what time powers may be executed, and in what cases partial and repeated executions may be made.

And, first, it may be remarked, that although a power is given generally, yet the courts, or at least equity, will not permit it to be exercised before the time in which it was the intention of the parties that it should be executed. Thus, where portions for younger children were to be raised *at such times* as the father should direct, and he having a daughter fourteen years of age, directed the trustees to raise the portion *immediately*. The daughter died under age, and the father claimed her portion as administrator. But Lord Thurlow said, "The meaning of a charge for children is, that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before that time. And although the power is in this case to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own life if it should be necessary. It would have been very proper to do so upon the daughter's marriage, or for several other purposes, *but this is against the nature of the power.*" And the bill was dismissed (*r*).

(*r*) Lord Hinchinbroke *v.* Seymour, 1 Bro. C. C. 395; and see 11 Ves. jun. 479 S. C. cited by Lord Eldon, who said the daughter was consumptive.

If a power be given to a person to make a lease, &c. six months, or any other given time before his death, the power may be executed at any time, although it be not six months before his death, but a month, a week, or a day, for the duration of his life cannot be known (*s*).

So where a power was given by a settlement to a married woman, *in case of the death of her husband in her life time*, to charge the estate with a sum of money, and she executed the power in the life time of her husband, and afterwards survived him; it was first determined by the Court of King's Bench, and then by the Court of Chancery, that the power was well executed (*t*). This case is an authority that where a power is authorized to be executed in a contingent event, it may be executed before the happening of the contingency. The words of the power seemed to make the happening of the contingency a precedent condition. It runs thus: that if the said J. S. (the husband) shall happen to die, and M. (his wife) shall him survive, and there shall be no issue of the marriage living at the death of M., then and in such case it shall be lawful for her at any time or times during her life, by any deed, &c. to charge the estate. Now it was of necessity that she should be allowed to execute the power after the death of her husband, although there was issue, but no such necessity existed during his life. From this decision it would seem to follow, that a power given to the survivor of two persons may be executed in the life time of both. However, in a case before Lord Thurlow (*u*) where a

(*s*) Harris *v.* Graham, 2 Ro. Abr. 247, pl. 6.

(*t*) Countess of Sutherland *v.* Northmore, 1 Dick. 56, S. C. 3 Vin. Abr. 427, pl. 8, nom. Sclater *v.* Travell.

(*u*) Mac Adam *v.* Logan, 3 Bro. C. C. 310, *vide supra*.

power

power was given to the survivor of two persons, and they executed a joint appointment, he held it bad; but it seems still open to contend, that as the power may be executed by each separately in the life time of the other, a joint appointment ought to be considered as the separate appointment of the one who survives, and consequently as a valid execution of the power. Lady Sutherland's case was not cited in the case before Lord Thurlow.

Where, previously to marriage, an agreement is made *generally* that the woman may dispose of her property, she cannot after the agreement, and *before* the marriage, make a binding will, unless expressly authorized to do so (*x*).

Sir Edward Coke lays it down as clear, that where there is a devise to A for life, and that after his decease the estate shall be sold, the sale cannot be made during A's life, but must wait till his decease. Mr. Hargrave justly observes, that this is a doubtful point upon the authorities (*y*). There was a case before Lord Hardwicke in which he expressed an opinion on this question which appears to have been overlooked. I allude to Uvedale *v.* Uvedale (*z*), where the devise was to the wife for life, and after her death the testator willed that the same should be sold, and Lord Hardwicke said that the words *after her decease* were not put in to postpone the sale. However, in a late case before the Court of Exchequer (in which I have reason to think the case of

(*x*) Hodsden *v.* Lloyd, 2 Bro. C. C. 534; Doe *v.* Staple, 2 Term Rep. 684. The marginal abstract of the case in Brown is inaccurate.

(*y*) See note (2) to Co. Litt. 113 a.

(*z*) 3 Atk. 117; and see Anonymous, 2 Leo. 220, pl. 276.

Uvedale

Uvedale and Uvedale was cited) where the devise was to A for life, and after her decease to trustees to sell and pay the money amongst the children then living, the court held that a sale could not be made till after the wife's decease (*a*). Where the parties beneficially entitled are adult, and the fee is devised, a sale may of course be made with their concurrence, during the life of the tenant for life. The purchaser would obtain the legal estate, and the *cestuis que trust* would be bound by the sale. But even if the parties are adult, yet where a power only is given, the title cannot be accepted unless the person in whom the fee is vested till appointment will convey the estate to the purchaser, for until the death of the tenant for life, the power, according to the case in the Exchequer, does not arise, and consequently cannot till then be executed.

Sometimes a power is given to a person on default, or failure of his issue, and it becomes doubtful at what time the issue must fail in order to give effect to the power. In Holt *v.* Burleigh (*b*), in a strict settlement, a power was given to the wife to sell the estate if she should survive her husband, *not having issue, or without issue of their two bodies.* The husband died leaving issue, and that issue died without leaving issue in the life time of the wife. And it was determined, that the wife might sell the land, although it was insisted that the husband leaving issue, the wife did not survive her husband not having issue, or without issue, and, therefore, the power never took effect. In a more recent case, where by a strict settlement a general power of appointment was given to the wife for want of issue, the

(*a*) Anon. Excheq. 1806. (*b*) Pre. Cha. 293, S. C. 2 Vern. 651.

wife

wife executed the power, and left a son living at her death; and it was decided, that the appointment was void (*c*). The cases, therefore, seem to establish this rule, that the power will take effect if there should be no issue living at the decease of the parent to whom the power is given.

It frequently happens, that powers are given to parties to be exercised by them when in the actual possession of the estate. In some cases it would be desirable that the power should be given so as to enable the party to execute it, although his remainder has not fallen into possession, and, at the same time, so as not to accelerate the charge under the power (*d*). Sometimes when a person in remainder has been desirous to execute his power as if in possession, it has been attempted to put the party in a situation to do so, by accelerating the possession of his estate. Mr. Butler observes, that, in one case, it is clear that this will answer the object intended, that is, where A is tenant for life, with the immediate remainder (without any limitation to trustees) to B for life, with a power for B to jointure when in possession. Here, if A surrenders to B, B is to all purposes in possession of the estate, and, therefore, in a situation to exercise his powers. But, he adds, that where there is an intermediate estate this never can be relied on. If it is expressed in the deed, as it generally is, that it shall be lawful for the party to exercise the power when in possession under the limitations, and there is a limitation to trustees to preserve the contingent remainders, the first tenant for life can in no wise put the second tenant for life in possession of the estate but by an actual con-

(*c*) Doe *v.* Denny, cited in 2 Wils. 337, reported in Say. 295. (*d*) See note to Co. Litt. 271 b. s. 3.

veyance

veyance of his life estate; consequently the party will then be in possession, not by virtue of the limitations of the deed, but by the act of the first tenant for life. For instead of being tenant in possession for his life only, as he would be if he was in possession under the limitations in the deed, he is tenant in possession for the life of another person, with a remainder for his own life; so that he has two estates which are perfectly distinct, and under the limitations of the settlement he is only tenant for life in remainder. Where these words, therefore, are inserted, it seems clear that the party is not in possession within the words or meaning of the deeds, and consequently not in a situation of exercising his power. Where these words are not inserted it may be contended that they ought to be implied (*e*).

Now, there seems ground to contend, that even where there is no limitation to trustees the power cannot be duly exercised. The question is, not whether in strictness of law the tenant is, after the surrender, in possession under the limitations, which he clearly is; but, whether the testator intended that the power should be executed in the given event. It is, in truth, a simple fraud on the remainder-man. Suppose A to be tenant for life, remainder to B for life, remainder to C, with a power to B to jointure when in possession. It seems clear that the testator could only mean that B should exercise his power on the death of A, or forfeiture of his estate; that is, he can be only considered to have contemplated the determination of the estate by the act of God (death), or the act of the law (forfeiture). But if A surrender to B, who exercises his power, and

(*e*) Co. Litt. 271 b. note (1) s. 3.

then

then B die in the life time of A, the estate will go to the remainder-man charged with the jointure, whereas, without the assistance of A, the estate could not have been charged by B in his (A's) life time. It may be said, that the possession of C, the remainder-man, is accelerated, inasmuch if no surrender had been made he would not have been entitled to the possession till the death of A; but this argument leaves the testator's intention behind, and makes it a mere question of loss and gain. And if we look at the question in that light, we shall find that surrenders of this kind are made for the express purpose of charging the remainder-man's estate, so that he is never benefited by the arrangement. A lease is granted previously to the surrender, in order to secure the profits to the tenant for life who surrenders. To hold, therefore, this to be within the words of the will or settlement, is to authorize the tenant for life in possession and the next remainder-man to commit a fraud on the other remainder-men. These observations appear to apply as well to a power under a settlement as to a power under a will, for in both the intention of the donor of the power is equally to be attended to.

Powers of appointment and revocation need not be executed to the utmost extent at once, but may be executed at different times over different parts of the estate, or over the whole estate, but not to the full extent of the power. Digges's case (*f*) is an authority, that under a power of revocation the uses of part of the

(*f*) 1 Rep. 173; and see Sir Richard Lee's case, 1 And. 67, and Co. Litt. 237 a.

land

land may be revoked at one time, and of part at another, and so of the residue, until the uses of all the land are revoked. So where a man has a general power of appointment, he may execute it at several times, and appoint an estate for life at one time, and the fee at another time (*g*). And the same of a power of revocation (*h*). So powers of jointuring, &c. may in like manner be executed at different times, provided that the party do not in all the executions exceed the limits of the power (*i*). In Sumpton *v.* Sir Andrew Jenner (*k*), a power was given to a feme covert, and it was to be by her *sole only and single* act and deed sealed, which Maynard insisted could not be *iterato*; but the court resolved that these words meant, without joining of the husband only.

These are cases where the power is really but partially executed by the first appointment; but a power, although exhausted at law, may be but partially executed in equity. Thus, if a man having a general power of appointment, or of revocation, appoint to one in fee by way of mortgage, the power is wholly executed at law; but as equity considers a mortgage merely a security for the debt, in equity it operates as a partial execution only (*l*). And whatever may be the form of the instrument, if it be in effect simply a mortgage, it will operate merely as a revocation *pro tanto*. But where

(*g*) See Bovey *v.* Smith, 1 Vern. 84.

(*h*) See Snape *v.* Turton, Cro. Car. 472; and Bullock *v.* Thorne, Mo. 615.

(*i*) Hervey *v.* Hervey, 1 Atk. 561; Zouch *v.* Woolston, 2 Burr. 1136, 1 Blackst. 281; and see Doe *v.* Milborne, 2 Term Rep. 721.

(*k*) 2 Keb. 261.

(*l*) Perkins *v.* Walker, 1 Vern. 97; Thorne *v.* Thorne, 1 Vern. 141, 182; Lassells *v.* Lord Cornwallis, Prec. Cha. 232.

there

there is not only a mortgage, but an ulterior disposition, inconsistent with the former, it will operate even in equity as a total appointment or revocation, unless there be a declaration that it shall be an appointment or revocation only *pro tanto*. The case of Fitzgerald and Fauconberge (*m*) does not go further than this. There, under a general power of revocation, William Fowler conveyed the fee to trustees to raise and pay debts. And after payment thereof that they should pay the overplus, and reconvey the estates unsold, to him, or to such persons, &c. as he should, by any deed or writing under his hand and seal, attested by two or more credible witnesses, appoint. And by a deed of even date, he reserved power to revoke the conveyance. It was determined, that the former settlement was wholly revoked. The court admitted the authority of the cases before cited as to mortgages; but they determined that Mr. Fowler's intention was to do an act inconsistent with the former settlement, *and to put the estate into a new channel.* Indeed, the mode of directing the disposition of the residue, but more especially the power of revocation reserved, strongly indicated an intention wholly to revoke the old settlement. The principle must be the same as is applied to revocations of devises by mortgages, &c. And it is clear, that a mere conveyance to a trustee in fee, in trust, to sell and pay debts, with the ultimate trust for the settlor, is, like a mortgage, only a revocation *pro tanto* of a prior will (*n*). But where the equity of redemption or residuary interest is settled differently, or a different power of disposition is reserved

(*m*) Fitzg. 207.

(*n*) Lady Vernon *v.* Jones, 2 Freem. 117; Ogle *v.* Cooke, 2 Bro. C. C. 592 cited.

over

over it, even equity will hold the mortgage or conveyance a total revocation. Upon the same principles the cases of Perkins and Walker, and Fitzgerald and Fauconberge, may well stand together. Nor does it appear to be material in these cases, whether the mortgage is made to the person seised of the estate subject to the power of revocation, or to a stranger (*o*).

(*o*) Peach *v.* Philips, 2 Dick. 538; Baxter *v.* Dyer, 5 Ves. jun. 656, which over-ruled Harkness *v.* Bayley, Prec. Cha. 514.

SECTION V.

WHAT AMOUNTS TO THE EXECUTION OF A POWER WHERE THE DONEE HAS NOT AN INTEREST IN THE ESTATE, AND THE POWER IS NOT REFERRED TO.

WHERE a man has a power to limit uses, and no power to convey the land, if he convey or devise the land generally, and the circumstances required to the execution of the power as to subscription, witnesses, &c. are observed, the conveyance or devise shall enure as a limitation of the use, because otherwise it would be void (*p*).

So if a man having several *powers*, but no *estates* actually vested in him, make a general disposition which can only take effect as an execution of at least one of the powers, it shall be deemed an execution of all the powers (*q*); or if a particular disposition be made, it will be deemed to be in exercise of such of the powers as authorize the act (*r*). The like construction will be made where the instrument is expressed to be in pursuance of his power generally, without referring to one in particular (*s*).

On the same principle it is, that where a man has a power of revocation, and does an act which can operate

(*p*) Sir Edward Clere's case, 6 Rep. 17 b. S. C. Mo. 476, nom. Worme *v.* Webster, ib. 567, nom. Parker *v.* Sir Edward Clere, S. C. affirmed upon error; Cro. Eliz. 877; Cro. Jac. 31; Hussey's case cited, ib.; and see 12 Mod. 469.

(*q*) Countess of Roscommon *v.* Fowke, 4 Bro. P. C. 523.

(*r*) Fitzgerald *v.* Fauconberge, Fitzg. 207.

(*s*) Udal *v.* Udal, Al. 81.

only as an exercise of it, and all incident circumstances prescribed by the proviso are observed, the act shall accordingly be deemed an execution of the power although no reference whatever is made to it, and there is not any express signification of the intent to determine and disannul the estates which will be defeated by the execution of it (*t*); *quia non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.*

And although the revocation is required to be made in *express words,* yet an instrument disposing of the estate to different uses, although not referring to the power, or expressly declaring an intention to revoke, will operate as a revocation (*u*) (1). This decision appears to be founded upon solid principles, for the words of the instrument which operate the revocation are *express words,* and do by law amount in themselves to a revocation.

But although a man may execute a power without reciting or taking the slightest notice of it, yet it is necessary that he should mention the estate or interest which he disposes of: he must do such an act as shews that

(*t*) Scrope's case, 10 Rep. 143 b; 2 Ro. Abr. 262 (C) pl. 1; and see Frampton *v.* Frampton, as it is said accordingly 6 Rep. 144 b. see the case in Mo. 735; Snape *v.* Turton, Cro. Car. 472; Deg *v.* Deg, 2 P. Wms. 405, Sel. Cha. Ca. 44; Fitzgerald *v.* Fauconberge, Fitzg. 107; Roscommon *v.* Fowke, 4 Bro. P. C. 523; and see George *v.* Lousley, 8 East, 13.

(*u*) Guy *v.* Dormer, Raym. 295; and see 3 Cha. Ca. 91.

(1) Mr. Powell, Pow. p. 115, says, that this point happened not to be material, as the event of this case would have been the same whether the revocation had been good or not. The case, however, appears to have depended on this point solely. There was a term of five years which the jury found had expired. Perhaps Mr. P. was led to think that this referred to a fine levied, and that a title was gained by non-claim.

be

he has in view the thing of which he had a power to dispose (*x*).

This question mostly arises upon wills. It is firmly settled, that a mere general residuary devise, however unlimited in terms, will not comprehend the subject of the power unless it refer to the subject, or to the power itself, or generally to any power vested in the testator (*y*) (11), or unless some part of the will would otherwise be inoperative, as if the subject of the power be real estate, and the donee make a general devise of all

(*x*) See 1 Atk. 560; 2 Bro. C. C. 303; 3 Ves. jun. 301; Lowson *v.* Lowson, 3 Bro. C. C. 272; M'Leroth *v.* Bacon, 4 Ves. jun. 159.

(*y*) Moulton *v.* Hutchinson, 1 Atk. 558; ex parte Caswall, 1 Atk. 559; Andrews *v.* Emmott, 2 Bro C. C. 297 (1); Buckland *v.* Barton, 2 H. Blackst. 136; Blake *v.* Bunbury, 1 Ves. jun. 525; Hales *v.* Margerum, 3 Ves. jun. 299; Langham *v.* Nenny, 3 Ves. jun. 467; Croft *v.* Slee, 4 Ves. jun. 60; Nannock *v.* Horton, 7 Ves. jun. 398; Bennet *v.* Aburrow, 8 Ves. jun. 609.

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(1) In Standen *v.* Standen, Lord Rosslyn endeavoured to refer the decision in Andrews and Emmott to the particular circumstances of the case, but it appears to have been decided on a broad general principle.

(11) In the case of Churchill *v* Dibben, it appears by the Register's book, that in a settlement a term of 500 years was created upon trust to raise 1000*l.* and pay the same as Elizabeth Brown, the intended wife, should by deed or will appoint, and in default thereof to be paid to her executors or administrators. By her will she gave some estates which she had power to dispose of to different persons, and after giving some pecuniary legacies, she gave "all the rest of her goods, chattels, estates, and estate whatsoever undisposed of," unto A, his heirs, executors, administrators, and assigns. It was declared by the decree, that as to this sum of 1000*l.* the said testatrix having made no particular appointment thereof, the same will belong to the defendant her executor. Reg. Lib. A. 1753, fol. 252.

his real and personal estates, and has *no real* estate, there the estate subjected to his appointment will pass (*z*). But slight circumstances will not amount to a sufficient indication of the intention: where the power is given to the husband after the death of his wife, and he makes a general disposition to take effect after his wife's death, that will not of itself be deemed evidence of his intention to execute the power (*a*): if the subject of the power be three per cent. consols, and the testator give some three per cent. consols as pecuniary legacies, the stock subject to the power will not, on that ground alone, pass (*b*): the instrument being executed in the manner required by the power goes for nothing (*c*): nor can the court act on the fact of there not being sufficient to pay legacies given by the will without the property over which the testator had a power of disposition (*d*): neither can parol evidence be received of the testator's intention to exercise his power (*e*).

So, where a man having several powers refers to some and executes them formally, that is an argument against any other power being executed by general comprehen-

(*z*) Standen *v.* Standen, 2 Ves. jun. 589, affirmed in Dom. Proc. nom. Standen *v.* Macnab, 6 Bro. P. C. by Toml. 193 (1); See Deg *v.* Earl of Macclesfield, Sel. Cha. Ca. 44.

(*a*) Andrews *v.* Emmott, 2 Bro. C. C. 297; Bennet *v.* Aburrow, *ubi sup.*

(*b*) Nannock *v.* Horton, *ubi sup.*

(*c*) Andrews *v.* Emmott, 2 Bro. C. C. 297.

(*d*) S. C.

(*e*) Moulton *v.* Hutchinson, 1 Atk. 558; Standen *v.* Standen, 2 Ves. jun. 589.

(1) Lord Rosslyn's argument in this case, as to the power being tantamount to an actual interest, was not called for, and has not been acted upon in subsequent cases.

sive

sive words in the same instrument (*f*). And it has been determined, that a devise of lands, *not now in settlement,* will not pass lands settled with a power of revocation (*g*), because the estate is properly under settlement though subject to be revoked.

However, where a man makes a voluntary settlement, and reserves a power to himself, it will, it seems, be construed liberally, and the courts will be anxious to seize on any words which may be deemed an execution of the power. Thus, in the case of Maddison *v.* Andrew (*h*), in a voluntary settlement, the grantor limited a term to trustees, with power to charge 1000*l.* The settlor made his will, and *charged* all his real and personal estate with his debts and legacies. Lord Hardwicke held, that the power was executed as it was to be construed liberally. And, as to the execution of it, the donee had used the word *charge,* which was the word in the power, and it was only a shadow of a difference that he had charged all *his* estate, whereas this was before settled to uses, for these powers to the owner were to be considered as part of the property (*i*). It should be observed, that this case has never been adverted to in the subsequent cases. It appears to draw a distinction as to the nature of the power which it would be difficult to support; the argument as to the words "his estate" would apply with equal force to every residuary disposition; a construction which Lord Hardwicke himself expressly over-ruled (*k*). But the case seems to depend

(*f*) Attorney-General *v.* Vigor, 8 Ves. jun. 256; see Maundrell *v.* Maundrell, 10 Ves. jun. 246.
(*g*) Litton *v.* Falkland, 2 Vern. 621.
(*h*) 1 Ves. 61.
(*i*) Lib. Reg. B. 1747, fol. 119.
(*k*) Ex parte Caswall, 1 Atk. 559.

upon its own particular circumstances. By the Register's book it appears, that the power was "by deed or writing to *limit* any part of the premises for raising any sum of money in his life-time not exceeding 4000*l.*; or in case such sum should not be raised in his life time, and he should die unmarried without issue, then he should have power by will to *charge* any part of the premises with the payment of any sum or sums of money not exceeding 1000*l.* to any person or persons as he should appoint." He was tenant for life under the settlement. The variation in the phraseology of the power was certainly remarkable (*l*).

The case of Probert *v.* Morgan, as it is reported in Atkins, also seems an authority that a power to charge a sum of money on an estate is well executed by a general charge in a will of a sum of money on the *testator's* estates. But it appears by the Register's book, that the question did not arise in that case. A term was limited to trustees to raise 2000*l.* and pay it as Probert should direct; and his three sisters afterwards became entitled to the reversion in fee of the estate in equal thirds, which reversion was formerly vested in Probert himself. Probert by his will charged all his real estate with 1000*l.* "*to be paid by his three sisters out of their respective shares of his estate.*" This, therefore, was a direct reference to the fund subject to the power, and it was impossible to doubt that the power was duly executed (*m*).

(*l*) Lib. Reg. B. 1747, fol. 119. (*m*) Reg. Lib. B. 1736, fol. 310.

SECTION VI.

WHAT AMOUNTS TO THE EXECUTION OF A POWER WHERE THE DONEE HAS AN INTEREST IN THE ESTATE.

The questions on this head arise either where the estate is conveyed generally, or where the use is appointed under the power, and also the estate is conveyed by force of the interest. First, it is well settled, that where a man has both a power and an interest, and does an act generally as owner of the land without reference to his power, the land shall pass by virtue of his ownership. He has an estate grantable in him, and also a power to limit an use; and when he grants the land itself, without any reference to his authority, it implies his intent to grant an estate as owner of the land, and not to limit an use in pursuance of his power. Nor is it an objection to this construction that *all* the land cannot pass unless the instrument be construed as a limitation of the use. This was one of the points resolved in Sir Edward Clere's case (*n*). At that time tenures *in capite* prevailed, and only two-thirds of land holden by that tenure could be devised. The Judges resolved, that if a man conveyed the land to such uses as he should appoint by will, the use resulted to him, and he was seised in fee in the mean time (*o*): and, that if he devised the land *generally*, his will should not operate as an appointment but as a devise of his interest, and consequently the devise would be good for two parts only, and void

(*n*) 6 Co. 17; and see Browne *v.* Taylor, Cro. Car. 38.

(*o*) See Brand's case, Ley, 39.

for the third; for, as owner of the land, he could not dispose of more, and his devise should be of as much validity as the will of every other owner having land held *in capite* (*p*).

This question, however, cannot arise in the same shape at the present day, as the ancient incidents to tenures *in capite*, so little consistent with the commercial polity of the present age, have been long abolished. But it may occur in this way, an estate may be settled to such uses as a man shall appoint, and in default of appointment as to *part* to himself, and as to the *residue* to strangers, and then he may make a general disposition. And, notwithstanding Sir Edward Clere's case, there is great reason to contend, that an intent apparent upon the face of the instrument to dispose of *all* the estate, would be deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument could not otherwise be satisfied (*q*).

In the case of King and Melling rather a curious point arose. A man was devisee under a will with a power to jointure. He suffered a recovery to the use of himself in fee, and afterwards covenanted to stand seised to the use of his wife for her jointure. The Judges were divided whether the devisee took for life or in tail, but they held, that supposing the power not barred by the recovery (which they thought it was), yet the covenant would not operate as an execution of it; for as the devisee had got a new fee, though it were defeasible by him in remainder, yet the covenant to stand seised should

(*p*) See Parker *v.* Kett, 12 Mod. 469; Wagstaff *v.* Wagstaff, 2 P. Wms. 258, 2d point. (*q*) See 10 Mod. 36.

enure

enure thereupon, and the use should arise out of the fee: he was seised in fee, and the jointure was made without any reference to his power (*r*).

But where the disposition, however general it may be, will be absolutely void if it do not enure as an execution of the power, effect will be given to it by that construction. This was the *point decided* in Sir Edward Clere's case. There Harwood the settlor had by an act in his life time disposed of two parts of the land; over the other part he had a general power of appointment by will, with remainder in default of appointment to himself in fee, and he devised this portion generally. Now the land being holden *in capite* he could not devise this third as owner of the land, and, therefore, it was solemnly decided that the will ought to operate as an execution of the power. Upon the principle of this decision it should seem, that if a man having a general power of appointment, with remainder to himself in fee, were to convey the estate generally by an instrument not adapted to pass his interest (as a bargain and sale unenrolled, or a release to a stranger without a previous lease for a year), and which would be totally inoperative as a conveyance of the interest, the instrument would be held to operate as an execution of the power, although the authority should not be referred to either expressly or by implication. This, however, is not a clear point.

On the above principle it is, that where a man has both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time if it be fed out of his interest, it shall take effect by force of the power (*s*). As where a tenant for life,

(*r*) 1 Ventr. 214, 225. (*s*) See Roger's case cited by Hale, Chief Justice, 1 Ventr. 228; Earl of Leicester's case, 1 Ventr. 278.

with

with power of leasing, grants a lease for a term absolute, without referring to or mentioning his power, the lease if it be supplied out of his interest would expire with his life, and it shall, therefore, operate as an execution of the power (*t*). But if the lease comprise fee simple estates as well as estates subject to the power, it seems a nice question, whether the deed shall enure by fractions, so as to be a lease out of the interest as to the fee simple lands, and an appointment as to the rest (*u*).

It is *intention* then that in these cases governs: therefore, where it can be inferred that the power was not meant to be exercised, the court cannot consider it as executed. Thus, if a man having several powers over different estates, and also interests in them, should recite the power over one estate, and execute it in a formal manner, and then recite, not that he has a power to appoint the other estate, but that he is seised in fee of it, and accordingly convey his interest in it by lease and release, the latter estate would be held to pass out of his interest, and not by force of his power, simply on the apparent intention not to execute the power (*x*).

On the other hand, where the instrument is expressly said to be in pursuance of the power, and it is clearly the appointee's *intention* upon the face of the instrument to take the estate by force of the power, although the appointor has also an interest in the land, and the power is badly executed, and so no estate raised, yet his interest shall not come in aid, at least not to the prejudice of the appointee, as where it would operate the surrender

(*t*) Campbell *v.* Leach, Ambl. 740; and see 10 Mod. 36.

(*u*) See Bibell *v.* Dringhouse, Mo. 645.

(*x*) See Maundrell *v.* Maundrell, 7 Ves. jun. 567, 10 Ves. jun. 246; see 6 East, 105, 106; and see Adney *v.* Field, Ambl. 654.

of

of an existing beneficial interest in him. Thus, if a tenant for life, with a power of leasing, refer to his power, and in execution of it grant a lease to a person having an existing valid lease, although the power prove to be badly executed, yet the new lease shall not, as between the lessee and the remainder-man, be construed to have enured out of the estate for life of the lessor, because under that construction, the existing valid lease would be merged by a surrender in law, to the prejudice of the lessee. But still it should seem that the estate intended to be created will take effect by estoppel *between the parties* (*y*).

But if a testator exercise a power by will, and it turn out that the power was either not well created (*z*), or was defeated by the happening of a contingent event subsequently to the will (*a*), the devisor's interest at the time of the will, although contingent and not vested, shall come in aid of his disposition; for in a will there are no particular words required to pass the estate; but any words that shew the intention of the testator are sufficient; and although only the power is expressed to be exercised, yet the words plainly manifest that the testator intended that the devisee should have the estate (*b*).

But here it may be observed, that where a man has a power to charge estates, which power he afterwards discharges, and a similar power is reserved to him over other estates, if the first power is executed by will before the raising of the second power, the will cannot be

(*y*) Roe *v.* Archbishop of York, 6 East, 86.

(*z*) Dobbins *v.* Bowman, 3 Atk. 408; see Goring *v.* Bickerstaffe, 1 Cha. Ca. 8, 9.

(*a*) Cross *v.* Hudson, 3 Bro. C. C. 30; and see Savile *v.* Blackett, 1 P. Wms. 777; Mose. 167 cited.

(*b*) Dobbins *v.* Bowman, *ubi sup.*; and see Habergham *v.* Vincent, 2 Ves. jun. 204.

deemed

deemed an execution of the second power, although it be republished subsequently to the creation of that power; for the will speaks only of the first power, which was as much gone as if it had never existed (*c*). And it seems doubtful whether the second power would have been executed if it had even embraced the same estate as the first power.

II. We now come to the cases where not only the use is appointed under the power, but also the estate is conveyed by force of the interest. The rule appears to be, that the instrument shall be construed either an appointment, or a release, as will best effect the intention of the parties. This is established by the case of Cox and Chamberlain (*d*). A man having a general power of appointment, with remainder to himself in fee, by lease and release, in pursuance of all powers in him vested, did grant, bargain, sell, alien, remise, release and confirm, limit, declare, and appoint, the estate to trustees to uses. If the deed operated as a conveyance of his interest, then the title was good; but if it operated as an appointment, the legal estate vested in the trustees; the intended uses, were mere trust estates, and the title was, under the circumstances, bad. Lord Alvanley held, that the instrument operated as a conveyance of the interest. He said it would be monstrous to hold that where there is a power and an interest, and the act being equivocal, it is doubtful whether he acted under the one or the other, the court should adopt that which would defeat the instrument. He therefore considered the words of the appointment as nugatory.

(*c*) Holmes *v.* Coghill, 7 Ves. jun. 499, 12 Ves. jun. 206.

(*d*) 4 Ves. jun. 631.

It

It must be admitted, that in this case Lord Alvanley considered the act as more properly a release than an appointment; and it does not, therefore, directly decide, that where there is (as is usual) *first a formal appointment,* and then a release, the instrument shall, in favour of the intention, be held to operate simply as a release. On the one hand it may be said, that the instrument cannot operate both as an appointment and release; and, therefore, the courts may well give it that operation which will effect and not destroy the intention of the parties. And this is clearly the better opinion. But, on the other hand, it may be insisted, that where the power is formally exercised, the release is thrown in merely by way of further assurance, and that too a great latitude of construction will only lead to carelessness in practice.

The great difficulty in the cases under discussion is to discover what *is* the intention of the parties, a question upon which the most enlightened minds must frequently differ. Thus, the late case of Roach and Wadham (*e*), appears to be in opposition to the case of Cox and Chamberlain, although in both cases the court professed to go upon intention.

The case is shortly this: An estate was conveyed to one Coates, his heirs and assigns, to hold unto the said Coates, his heirs and assigns, to the use of such person or persons, for such estates, &c. as Watts the purchaser should by any deed or deeds, writing or writings, under his hand and seal, to be by him duly made and executed in the presence of, and attested by, two or more credible witnesses; or by his will, &c. limit, direct or ap-

(*e*) 6 East, 289.

point,

point, give or devise the same. In default of such direction, &c. to the use of Watts, his heirs and assigns, for ever. By this deed a perpetual rent was reserved to the vendors, and Watts covenanted with the vendors for payment of it. Afterwards, by indentures of lease and release, Coates (by direction of Watts) did (according to his estate and interest) bargain, sell, and release; and Watts did grant, bargain, sell, alien, release, ratify, and confirm; and also limit, direct, and appoint the estate in question, *and all his estate, right,* &c. therein, unto Wadham and Stevens (purchasers of the estate), and Powell a trustee to bar dower, to hold unto Wadham, Stevens, and Powell, their heirs and assigns, to the use of Wadham, Stevens, and Powell, and the heirs and assigns of Wadham and Stevens for ever, as tenants in common, in trust, as to the estate of Powell, for Wadham and Stevens, their heirs and assigns, as tenants in common, subject to the perpetual rent. And covenants were inserted from Wadham and Stevens to Watts to pay the rent, and indemnify him from it, but Wadham did not execute the deeds.

The question was, whether the estate conveyed to Wadham and Stevens, and their trustee, was derived out of the interest of Watts, so as to make them liable in an action of covenant for the rent as his assignees, or whether the estate took effect under his power, in which case it was admitted they were not bound by the covenants entered into by Watts. It was contended by the counsel, that the power was merged in the fee; but that position was abandoned upon its being stated that the judgment at the Rolls in the case of Maundrell v. Maundrell was reversed (*f*). The single

(*f*) *Vide supra*, ch. 1, sect. 5, VI.

point

point then was, whether the instruments operated as an execution of the power, or a conveyance of the interest. And it was determined, that they operated as an exercise of the power, and consequently that the purchasers from Watts were not liable to an action of covenant for non-payment of the perpetual rent. The court said, "It ought to appear very clearly from the deeds that the conveyance or the covenants therein could not take effect unless it operated as a conveyance out of the interest, and not by way of appointment, in order to induce the court to determine, that where the trustee to uses in a conveyance releases to a purchaser, it shall not operate as an appointment. Had it been the intention of the parties that the estate which Wadham was to take should be derived out of the interest which Watts had, it would have been wholly unnecessary that Coates should have been a party to the deed, his being made a party to it shows that something was to be taken by way of appointment; and if any thing, there is nothing from whence there can be collected an intention that less than the whole should pass by those means, the reason for which is obvious, as it might prevent such objections to the title as might be made if it were derived immediately from Watts."

It had, as we have seen, been already settled by Lord Alvanley, in Cox *v.* Chamberlain, that where a person has both a power and an interest, and the instrument is adapted to convey the interest, and the intention of the parties will be best effected by that construction, such a construction shall prevail, although words of appointment are used. This decree of Lord Alvanley's has ever since been deemed an authority, and been acted upon in practice. The principal argument in Roach *v.* Wadham

Wadham was, that Coates, the trustee as he was termed, joined in the conveyance. But it should seem that Coates had no interest whatever in the estate in question. He was a mere conduit pipe, a releasee to uses, in whom not even Lord Chief Justice Dyer's *scintilla* (which Chief Baron Periam, in Chudleigh's case, likened to Sir Thomas More's Utopia) remained an instant. The concurrence of Coates, therefore, was perfectly nugatory, and only evinced the unskilfulness of the person who prepared the deed. If, indeed, Coates had actually had any estate, his concurrence under the circumstances of this case, must have afforded decisive evidence that Watts did not intend to exercise his power. If the case be divested of this circumstance, the question depends solely on the intention of the parties. It might be urged, that the intention of the parties required the instruments to operate as a conveyance of Watts's interest, were it only to make the purchasers liable to an action of covenant as assignees of Watts for the recovery of the rent. Such a construction would have enabled, and certainly have induced, the persons entitled to the rent to bring their action against the actual terre-tenant, and not against the original covenantor, which would have prevented the circuitous remedy that the decision will compel the parties to resort to. This construction it might be said was imperiously called for in this case, inasmuch as Wadham had not executed the deeds, and consequently was not bound by *covenant* to indemnify Watts against the rent. It might also be insisted, that the conveyance being by lease and release, was strong evidence of the intention of the parties, as the lease for a year was unnecessary if Watts intended to exercise his power. When a man has both a power and an interest,

terest, and it is intended to exercise the power, and also convey the interest, the appointment is almost invariably made by a distinct witnessing part, which precedes the release. The deviation from the usual form in the present case is evidence that it was not the primary intention of the parties to exercise the power.

To the foregoing reasons another may be added which seems more conclusive. By the conveyance it is evident that the parties wished to prevent a right of dower attaching in their wives, and at the same time to keep the inheritance in themselves. This intention would have been effected by construing the instruments as a conveyance of Watts's interest, and appears to have been defeated by the construction adopted. *For as the deeds were holden to operate as an execution of the power, the habendum to the purchasers and their trustees vested the fee in them, and the subsequent limitation to the purchasers and the trustee, and the heirs and assigns of the purchasers, was void at law, as an use upon an use, and was good only as a trust in equity.*

Where a person having a particular estate and also a power, makes a disposition containing words both of appointment and conveyance, yet it shall not operate as an appointment, and also as a conveyance against the intention of the party executing the instrument. Thus, in Langley and Brown (*g*), under a settlement previously to an intended marriage, the estate was limited to the intended wife for life, then to her in tail, remainder to her appointment generally, in default of appointment to her in fee. She before marriage, by an instrument in pursuance of her power, did appoint, limit, give and

(*g*) 2 Atk. 195.

grant the estate and the reversion thereof *expectant upon her death,* to her intended husband in fee, *who was in possession,* chargeable with monies to be paid *after her decease.* Lord Hardwicke appears to have considered that the instrument might have operated both as an appointment of the remainder and as a release of her estate, so as to create a base fee, the grantee being in possession; but he ruled otherwise, as the grant was intended only to take effect *after her death,* and not to pass any estate in possession.

SECTION VII.

OF THE QUALIFICATIONS WHICH MAY BE ANNEXED TO THE EXECUTION OF POWERS BY THE DONEES THEREOF.

A DONEE of a power may limit the event upon which the deed executing the power shall take place. Therefore, if a power be given to be executed by deed, inrolled in any court, the donee may direct the deed executing the power to be inrolled in some particular court, and until it is so inrolled, the execution of the power will be imperfect (*h*). So, if he declare that when A doth pay 10s. the settlement shall be revoked, there it is not singly the deed nor payment, but both that complete the revocation (*i*). And in like manner he may covenant to levy a fine, or suffer a recovery, with an intent to revoke the power; and although neither of them is necessary, yet the power will not be well executed till the fine is levied, or the recovery is suffered (*k*). Hobart, Chief Justice, even laid it down, that a verbal declaration that the execution of the power shall not take effect till a particular time, is good (*l*); which, it should seem, may be supported on the same principle that deeds in general may be delivered as escrows.

Under a power of appointment, the donee may either appoint absolutely, or may reserve a power of revocation, although not expressly authorized to do so by the

(*h*) Digges's case, 1 Rep. 173.
(*i*) 3 Keb. 511; Raym. 239.
(*k*) Earl of Leicester's case, 1 Ventr. 278.
(*l*) Kibbet *v.* Lee, Hob. 312.

deed creating the power (*m*), and such a power may be reserved *totics quoties* (*n*), and the new power of revocation need not be attended with the same solemnities as the first power (*o*).

And where a power is given to two persons, *or the survivor of them*, with or without power of revocation, they may execute a *joint* appointment, and reserve a power to the *survivor* to revoke. The argument against the validity of the power of revocation to the survivor was, that the parties could not intend that a joint appointment should be defeated by any but a joint revocation (*p*).

But it seems that where a power is given to two jointly, and not to the survivor of them, they cannot upon a joint appointment reserve a power of revocation to the survivor. Upon this principle, Lord Redesdale held, that under a power to husband and wife, a will by the husband, indorsed by the wife after his death, expressive of her approbation of the disposition thereby made, and her confirmation of it, would not do: and he said that being a will revocable by the husband at any time, even if the wife had at the moment subscribed a ratification of it, he could not conceive it to be an appointment under the power, because it would reserve a power of revocation to one of the two parties, as the husband might revoke his will, but his wife could not (*q*).

(*m*) Adams *v.* Adams, Cowp. 651; see Becket's case *infra*.

(*n*) Lady Hasting's case, 3 Keb. 7.

(*o*) Winstandley's case, 3 Keb. 7, cited; and see S. C. cited, 2 Keb. 270.

(*p*) Brudenell *v.* Elwes, 1 East 442, 7 Ves. jun. 382.

(*q*) Bushell *v.* Bushell, 1 Rep. T. Redesdale, 90.

A *will* is always revocable, and, therefore, where the power is executed by will, an express power of revocation need not be reserved (*r*). But where the power is executed by *deed*, unless a power of revocation is reserved in the deed, the appointment cannot be revoked (*s*); no, not even if the original power expressly authorize the donee in the most unlimited terms, to appoint and to revoke his appointments from time to time; as the law will not endure a prospective power like this, but on every execution, a new power of revocation must be reserved. This was solemnly decided by Lord Chancellor Harcourt, and all the Judges of England (*t*), and finally in the House of Lords. The Court of King's Bench, upon a case referred to them by the Lord Chancellor, held the second execution void. Lord Harcourt decreed accordingly; and upon an appeal to the House of Lords, the decree was affirmed by the unanimous opinion of the Judges of the Court of Common Pleas and Court of Exchequer.

This decision appears to have owed its foundation to the anxiety of the courts, to restrain the reservation of such powers, and to the assimilation of powers to conditions at common law, which they do not resemble. It is impossible to frame any objection upon principle, to a general power of revocation in the first deed, embracing all future executions: the power is only tantamount to what may still be done, by repeatedly reserving new powers of revocation.

(*r*) *Vide infra*, sect. 8.

(*s*) Hatcher *v.* Curtis, 2 Freem. 61.

(*t*) Hele *v.* Bond, Prec. Cha. 474; 1 Eq. Ca. Abr. 342; S. C. MS. See a fuller note of this case than any in print, App. No. 3.

In a case before Lord Hardwicke, a point nearly similar arose. By a settlement, powers of appointment were given to a woman; and at the end of the settlement, it was declared that every appointment made by her by virtue of the powers in the deed, might from time to time be revoked, and a new appointment made. She made an appointment, without reserving a power of revocation, and then executed another appointment. It was insisted, on the authority of Hele and Bond, that the second appointment was void. There was not, however, any occasion to give a determinate opinion on this point; but Lord Hardwicke, in giving judgment, said, that he was very doubtful whether the case of Hele and Bond would govern the present, though he inclined at first that it would. In the present case, he said, there were two powers *in the very creation*, a power to appoint uses, and a power to revoke uses. Now the power to appoint uses was executed by the first deed, but the power of revocation was not executed till afterwards; then the question would be, whether both might not be executed once, as they seemed to be distinct and separate powers. In Hele and Bond, he added, the power of revocation was executed; and the doubt was, whether the uses could be revoked *totics quoties*, without reserving a power of revocation (*u*). The very same point arose in a case before the determination of Hele and Bond, but it was not necessary to decide it. The case was not referred to in Langley and Brown. The reporter says, "it was touched whether the uses limited according to the

(*u*) Langley *v.* Brown, 2 Atk. 195.

power

power were revocable by the proviso, and Mainard said it might be a question." (*x*).

Now it appears to be quite impossible to support this distinction. Lord Hardwicke distinguished the case before him from Hele and Bond, because there the power of revocation, he said, was executed; and the doubt was, whether the uses could be revoked *toties quoties*, without reserving a power of revocation, while in his case there were two distinct powers; namely, a power to appoint uses, and a power to revoke the uses so appointed. The precise point, however, was actually decided by the case of Hele and Bond. Some *dicta* represent that case as having been decided, on the ground that the power was merely tantamount to the usual power of revocation and limitation of new uses, and certainly that was the true ground of the decision: the judges were of opinion that a power could not be originally reserved to revoke uses to be subsequently appointed, but they never denied that *in words*, three distinct powers were reserved, viz. 1st, a power to revoke the original uses; 2d, a power to appoint new ones; and 3d, a power to revoke such new uses. The Judges of B. R. certified, "that *the power of revocation and limitation of new uses* in the first settlement was fully executed by the first appointment; and that the *further power in the settlement to revoke any new limitation or appointment* was void in the creation as to such uses as should be afterwards newly limited, unless a power of revocation should be again expressly reserved." The point, there-

(*x*) Udal *v.* Udal, Al. 81. Note, the case of Young *v.* Cottle, 1 P. Wms. 101, turned upon the nature of the property, and the revocation was of an original settlement, and not of a settlement under a power.

fore, doubted in Udal and Udal, and Langley *v.* Brown, was the very question decided in Hele and Bond. The cases cannot be distinguished. But we must not confound these cases with those upon powers of sale and exchange, or partition, for there the uses limited under powers previously executed, are not *revoked*, but simply *transferred* to the estate bought or taken in exchange, or upon a partition (*y*).

It is generally thought that the reservation of a power of revocation only, will not enable the donee to revoke the old uses, and also to appoint new ones (*z*). Mr. Powell in one place states clearly, that in such case new uses may be declared (*a*), whilst, in a subsequent page, he enters into a long discussion to prove the contrary (*b*).

Becket's case, which is the first in the books apparently on this subject, is thus stated in Lane (*c*) (1): "R. B., seised of lands in fee, levies a fine, &c. and declares the use to be to himself for life, and after to T. B. with power of revocation, and to limit new uses; and if he revoke, and not declare, then the use shall be to the use of himself for life, and after to Henry Becket, [and then by a subsequent deed, R. B. revoked

(*y*) See Earl of Uxbridge *v.* Bayly, 1 Ves. jun. 499. There appears to have been no foundation for the argument that the charge in this case was revoked.

(*z*) 2 Vol. Cas. & Opin. p. 97, 2 Trea. Eq. p. 163, 2d Edit. Fonblanq. n. ibid. and 4 Cruise's Dig. 232, s. 18.

(*a*) Pow. Powers, 244.

(*b*) Id. 272.

(*c*) Lane 118; see ib. 91.

(1) Mr. Powell does not refer Becket's case to the true ground of the decision. In stating Baron Snig's argument, he omits the only part of it from which that Judge's opinion can be collected.

the

the first deed, and limited new uses], with power in that indenture also to revoke and limit new uses, and that then the fine shall be to such new uses, and no other; and after, by a third indenture, he revoked the second indenture, and declared the use of the fine to be to the use of himself for life, and after to Henry Becket in tail, the remainder to T. B." The question was, whether the third indenture was a good revocation and limitation. It is evident that there is a chasm in the statement of the facts: I have attempted to fill it up with the words between crotchets. It appears clearly, from the judgment of the court, that there was a second indenture executed, which also contained a power of revocation and limitation of new uses. Bromley and Altham, Barons, thought that the new uses were well raised by the third indenture, and they relied on Digges's case. Snig, Baron, held the contrary, as the first deed ought to authorise *all* the declarations on the fine, and he said, "*that such an indenture to declare uses upon uses was never made, and it would be mischievous to declare infinite uses upon uses.*" And Tanfield agreed with Snig, but on a different ground; he appears to have thought that the power to limit new uses was not well pursued, as he had *declared,* but not *limited* new uses. Now it seems quite clear, that the point under consideration did not arise in this case, for the power in the second indenture actually authorized a new limitation of uses; the question simply was, whether such powers could be reserved from time to time. This is proved by Roll's report of the same case, which is in these words: "If a man suffer a recovery, and limit the uses by indenture, with a power of revocation and limitation of new uses, and afterwards by another

another indenture he revokes and limits new uses with like power of revocation and limitation of new uses, this second power of revocation and new limitation of uses is good, for all rise out of the recovery, which is the foundation. Becket's case, *per curiam præter* Snigg (*d*)." If further evidence were wanting, it is abundantly supplied by Lord Chief Justice Hale's argument in the case of Fowler and North (*e*) We may therefore dismiss Becket's case from our consideration; it does not affect the question before us, and the point which was then doubted, is now perfectly established.

The first case that appears to be in point is Ward and Lenthal (*f*). The case was, that a man levied a fine with a power of revocation and limitation of new uses, and by a second deed he revoked the uses, and made new limitations, with a power only to revoke; and by a third indenture he revoked the uses of the second indenture, and limited new ones. It became unnecessary to decide the point; but the court is reported to have resolved, that where powers of revocation and new appointment are given, the donee may revoke and limit new uses *toties quoties*, and all the estates shall be raised out of the first seisin. But if in any indenture, he reserve a power of revocation, and do not reserve a power expressly to limit new uses, he can only revoke, and cannot limit new uses by virtue of the estate first raised.

Now in this case we observe the resolution merely was, that where a deed is executed *under a power of*

(*d*) 2 Ro. Abr. 262. (B) pl. 2. (*f*) 19 Car. 2, 1 Sid. 343.
(*e*) 3 Keb. 7.

revocation,

revocation, reserved upon the execution of a former power, no uses can be limited out of the old seisin, unless the deed creating such power of revocation also contain an express authority to limit new uses. This seems to depend upon the ground of the decision in Hele and Bond. But it is observable, that it is no where said that a power of revocation *in the original settlement,* is not tantamount to a power of revocation and limitation of new uses.

In the case of Smith and Wheeler (*g*), Twisden, Justice, said, that whoever hath a power of revocation, hath a power of limitation. In the case of Fowler and North (*h*), no decision was made, but Hale, Chief Justice, laid it down that a power of appointment might with power of revocation be executed *toties quoties,* and he said it was resolved before, upon as great a settlement as any subject in England had, *without any power to limit new uses* (1). Agreeably to this was my Lord Nottingham's judgment, when Lord Keeper (*i*), that a power of revocation in an original settlement, enabled the donee not only to revoke the old uses, but to limit new ones; and on a subsequent hearing he declared himself clearly of the same opinion (*k*).

(*g*) 22 Car. 2, 2 Mod. 40.
(*h*) 24 Car. 2, 3 Keb. 7.
(*i*) 26 Car. 2, Anon. 1 Cha. Ca. 241.
(*k*) See Colston *v.* Gardner, 2 Cha. Ca. 46.

(1) The same case is reported in 1 Ventr. 197, nom. Sir Samuel Jones *v.* The Countess of Manchester. Ventris appears to have mistaken the arguments at the bar, for the resolutions of the court, as will appear upon an attentive perusal of the reports.

It

It remains to state an anonymous case in Strange. The case was this: A suffered a recovery to the use of himself for life, remainder to three persons successively in tail, remainder to himself in fee, with power to revoke the three remainders in tail. He accordingly revoked them, and by the same deed declared new uses in favour of the plaintiffs, without any words of conveyance, covenant to stand seised, or consideration expressed. The court held, that the uses were not well raised, because the uses of the recovery were full before, and the power was only to revoke, and not to limit new uses (*l*).

This case does not appear to be in opposition to the decision of Lord Nottingham. It seems from the report, that A limited new uses out of the fee simple generally, and certainly it cannot be contended that he could affect his life estate or reversion, without an express power, as the power of revocation did not extend to those estates, but only to the remainder in tail. The question there must have been, not whether a power of revocation implied a power to limit new uses, but whether a power of revocation itself could be implied as to part of the estate in the land, to which it did not expressly relate. Besides, as he reserved a partial power of revocation, and would after the revocation become seised of the entire fee simple, and part of the fee could not be affected by a bare appointment, an intention appeared to reserve a power of revocation only, and not a power of limitation of new uses, which would not have answered the purposes of the settlement. This

(*l*) Anonymous, 1 Str. 584.

case

case is very distinguishable from a general power of revocation, extending to all the limitations in the settlement.

And here we must be careful to distinguish the case of Atwaters and Birt (*m*). There it was declared, that upon the revocation the uses should cease, and the estate should remain to the use of the settlor and his heirs; and it was held, that after revocation he could not limit new uses out of the old seisin, as no one was seised to his use, and therefore no use could arise. No one can doubt the propriety of this determination: by the very terms of the settlement the seisin was exhausted in serving the use in fee, limited to the settlor, and consequently no use could be raised, except by an original conveyance. Whenever, therefore, it is declared, that upon the revocation the estate shall remain to the settlor in fee, it cannot be contended that he has a power to limit new uses.

The result of the authorities appears to be,

1st, That in a deed *executing* a power, a power of revocation and new appointment may be reserved, although not expressly authorized by the deed *creating* the power (*n*). And that such powers may be reserved *toties quoties* (*o*).

2d, That where an appointment under a power is made by deed, it cannot be revoked unless an express power be reserved in the deed by which the power is executed: a revocation will not be authorized by a general prospective power in the deed *creating* the first power (*p*).

(*m*) Cro. Eliz. 856.

(*n*) Adams *v.* Adams, Cowp. 651; see Digges's case, 1 Rep. 173 b.

(*o*) Becket's case, Lane 118; Hele and Bond, Pre. Cha. 474; App. No. 3; Digges's case, *ubi sup.*

(*p*) Hele and Bond, Prec. Cha. 474.

3d, That

3d, That although in the *original* settlement a power of revocation only be reserved, yet a power to limit new uses is implied, and may be executed accordingly (*q*), unless a contrary intention can be collected from the whole settlement (*r*), or the estate is expressly limited to other uses (*s*). But,

4th, That every power reserved in a deed *executing* a power will be strictly construed, and therefore a mere power of revocation in such a deed will not authorise a limitation of new uses (*t*).

It remains on this head to observe, that upon the authority of Wall and Thurborne (*u*) an opinion has prevailed, that a power of revocation cannot be annexed to a power *simply* collateral. The wife had a power under her husband's will to appoint an estate amongst her daughters, and she executed the power with power of revocation, but never actually revoked the settlement. The book says, "as to the power of revocation the case may be eased of that, for it was only an authority in the wife; and that being once executed, she could not reserve such power to herself." In the first place then it appears, that the point did not call for a decision, and it is very far from clear that the *dictum* was not the argument of the counsel. Such a doctrine would be very inconvenient, and certainly cannot be considered as settled.

We shall have occasion in another place to consider what conditions may be annexed to the estates limited under particular powers.

(*q*) Fowler *v.* North, 3 Keb. 7; Anon. 1 Cha. Ca. 242; Colston *v.* Gardner, 2 Cha. Ca. 46.

(*r*) Anon. Str. 584.

(*s*) Atwaters *v.* Birt, Cro. Eliz. 856.

(*t*) Ward *v.* Lenthal, 1 Sid. 343.

(*u*) 1 Vern. 355.

SECT.

SECTION VIII.

OF THE EFFECT OF THE EXECUTION OF A POWER.

I PROPOSE to treat first of the operation of the instrument executing the power; secondly, of the manner in which the estates created take effect in regard to themselves; and thirdly, the effect of the execution of the power on the estates in the settlement.

First, then, with regard to the instrument, in whatever mode the power is exercised, whether by an act *inter vivos*, as grant, bargain and sale, lease and release, covenant to stand seised, feoffment, and fine, or by a will, the instrument in every case operates strictly as an appointment or declaration of the use, and, therefore, by reason of the rule before noticed, that there cannot be an use on an use, the bargainee, &c. takes the legal estate, the appointment being made to him; and if any ulterior use is declared, it operates merely as a trust in equity. It is, however, apprehended, that if the power be executed by way of covenant to stand seised, the use would vest in the person intended to take beneficially, and not in the covenantee.

But a *will* made in execution of a power, has a peculiar operation, it not only operates as an execution of the power, but also in most respects partakes of the qualities of a *proper* will. We have seen, that if a power of revocation is not reserved in a *deed* executing the power, the instrument is irrevocable; but this does not hold good as to a *will*, for although in truth it is not strictly a will, but simply a declaration of use, yet it so far retains the properties of a will

will as to be ambulatory till the death of the testator, and consequently revocable without any express power reserved for that purpose (*x*). So, such a will will be revoked by a covenant, amounting in equity to a conveyance in the same manner as a proper will (*y*); it will also be revoked by any act amounting to a revocation in law of a will (*z*), or by cancellation, or any of the methods pointed out by the statute of frauds (*a*). Again, the appointment will lapse by the death of the donee in the testator's life-time (*b*); but although the appointee survive the testator, yet he will only take from the time of the testator's death (*c*). Of course, executors cannot take derivatively from the appointee, yet an appointment may be made to executors or administrators, who may be used in a will as distinct from the testator, and as persons designated to take in the event of the death of the appointee, in the testator's life-time (*d*) (1). So lapsed legacies of personalty will

(*x*) Hatcher *v.* Curtis, 2 Freem. 61; and see 1 Ves. 139, 2 Ves. 77, 612; Lisle *v.* Lisle, 1 Bro. C. C. 533; Lawrence *v.* Wallis, 2 Bro. C. C. 319.

(*y*) Cotter *v.* Layer, 2 P. Wms. 662; see Treat. Purch. 2d edit. p. 130—133.

(*z*) Reid *v.* Shergold, 10 Ves. jun. 370.

(*a*) 2 Ves. 77.

(*b*) Oke *v.* Heath, 1 Ves. 135; Vanderzee *v.* Aclom, 4 Ves. jun. 771; Burgess *v.* Mawbey, 10 Ves. jun. 319; Earl of Salisbury *v.* Lambe, Ambl. 385.

(*c*) Duke of Marlborough *v.* Lord Godolphin, 2 Ves. 61, S. C. MS.; Southby *v.* Stonehouse, 2 Ves. 616; Vanderzee *v.* Aclom, 4 Ves. jun. 771.

(*d*) Burnet *v.* Helgrave, 1 Eq. Ca. Abr. 296, pl. 2.

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(1) This is the principle established by this case; but whether it was rightly applied to the facts in that case is another question. See Oke *v.* Heath, Duke of Marlborough *v.* Lord Godolphin, and Vanderzee *v.* Aclom, cited *sup.*

fall

fall into the residue (*e*), nor in equity will the death of the appointee defeat a charge on the interest appointed to him, in favour of a person who survives the testator (*f*).

The same latitude also is allowed in the terms of the devise, as in the case of a proper will; but this doctrine must be discussed hereafter (*g*). The analogy has even been carried so far, that a limitation by will under a power, to the heir at law of the donee of the power, has been held to give him an estate by descent (*h*). This decision was made upon the known rule that a common devise in fee simple to an heir at law, gives him no estate at all, he being adjudged in by descent, and the determination that an appointment by will is subject to the same rules as a common devise. This it must be allowed was a very extraordinary decision. It may be right to hold that the *instrument* shall operate as a *proper* will, as to the words and general effect of it; but upon what solid principle a man can be held to take that by descent which never vested, or had a chance of vesting, in his ancestor, it is not easy to conceive. We may ask with Lord C. J. Willes, will any one say that any thing can descend to the heir that did not vest in the ancestor? (*i*) The grounds of the determination were quite foreign to the question. The principle of the decision cannot even be supported by any plausible fiction, nor does policy require the adoption of it, as in the general run of cases it must be wholly immaterial whether the appointee take by de-

(*e*) Oke *v.* Heath, *ubi sup.*; Falkner *v.* Butler, Ambl. 514.

(*f*) Oke *v.* Heath, *ubi sup.*

(*g*) *Vide infra*, ch. 9, sect. 2.

(*h*) Hurst *v.* the Earl of Winchelsea, 1 Blackst. 187.

(*i*) Willes, 338.

scent or purchase. It should be observed, that in the case referred to, the power was reserved to the person who made the settlement, and who was at that time seized in fee. It may not, therefore, be deemed a general authority, that in every case of a beneficial power, the heir of the donee, being the appointee, takes by descent, although the donee himself never had any interest in the estate, nor indeed was it acquiesced in as an authority upon the point it professed to decide; for the decree of Lord Keeper Henley, in conformity to the judgment of the King's Bench, was appealed against in the House of Lords, and the appeal was afterwards compromised (*k*).

Where the will relates to personalty, it must be proved in the Spiritual court. This has been determined even in regard to an appointment by the will of a *feme covert*, who cannot in the notion of law make a will (*l*), although a different opinion appears at one time to have prevailed (*m*). The courts of equity will not, however, at this day read the appointment by will until it is duly proved as a proper will in the Spiritual Court, nor will the probate preclude the necessity of proving the instrument as an appointment, upon any claim under it in a court of equity (*n*).

We shall presently see that estates created by the execution of a power take effect as if created by the original deed; and, in general, a deed executing a power cannot be considered as a new alienation, or in-

(*k*) 2 Burr. 882.

(*l*) Ross *v.* Ewer, 3 Atk. 156.

(*m*) Daniel *v.* Goodwin, Exch. T. 8 and 9 Geo. II. MS. App. No. 4

(*n*) Rich *v.* Cockell, 9 Ves. jun. 369.

dependent

dependent conveyance (*o*); but still there are cases in which a deed executing a power is for many purposes considered as a substantive, independent instrument. Thus such a deed affecting an estate in a register county, must be registered; it is within the mischief intended to be guarded against by the acts, as a purchaser could not otherwise discover whether the power has been exercised (*p*). So a deed executing a power over real estate has been deemed a *conveyance* within the statute of Elizabeth, so as to be fraudulent, because it was a conveyance (*q*). So on an issue to try whether the plaintiff were intitled by two writings, or any other purporting a will of J. S., and the evidence was of a feoffment to the use of such person as J. S. should appoint by his will; in which case it was contended that the devisees were in by the feoffment, and not by the will. The court held, that this was only *fictione juris*, for that they were not in *without* the will, and therefore that was the principal part of the title, and such proof was good enough, and pursuant to the issue, and a verdict was accordingly given for the plaintiff (*r*). So, although the estate did not originally belong to the donee of the power, and the estate created by the appointment is considered as limited by the deed creating the power, yet a person deriving title under an appointment, is considered as claiming *under* the donee, within the meaning of a covenant by him for quiet enjoyment against any person claiming under him (*s*).

(*o*) See Coke's argument in Lady Gresham's case, Mo. 261.
(*p*) Scrafton *v.* Quincey, 2 Ves. 413.
(*q*) See 2 Ves. 65.
(*r*) Bartlet *v.* Ramsden, 1 Keb. 570.
(*s*) Hurd *v.* Fletcher, Dougl. 43.

Where there is a power to appoint part of a settled fund, the execution of the power takes the part appointed entirely out of the settlement, so that although the beneficial interest in it is not immediately disposed of, yet there can be no resulting trust for the benefit of any person under the deed creating the power (*t*). Although the fund sustain a loss, yet the sum subjected to the power may be appointed accordingly, and the loss must be borne wholly by the persons entitled to the residue (*u*).

II. The estates created by the execution of a power take effect precisely in the same manner (with the exception shortly noticed) as if created by the deed which raised the power. Thus, suppose a general power of appointment to be given to a man by deed, and he by virtue of his power limit the estate to A for life, with remainder to his children in strict settlement, these limitations will take effect as estates limited by the original deed; and in exactly the same way as they would have done had they been limited in that deed by the grantor of the power (*x*) in lieu of the power of appointment by force of which they were created. And it has been contended, that the acts done in consequence and by virtue of an authority, and pursuant thereto, are the acts of the old proprietor, *and of that day wherein he in virtue of his ownership delegated that authority.* But this Lord Hardwicke over-ruled. He admitted the principle, that where a person takes by execution of

(*t*) Mansell *v.* Price, Rolls, MS. App. No. 5.

(*u*) Oke *v.* Heath, 1 Ves. 135; see Shelley *v.* Earsfield, 1 Rep. Cha. 110.

(*x*) See Middleton *v.* Crofts, 2 Atk. 661.

a power,

a power, whether of realty or personalty, it is taken under the authority of that power, *but not from the time of the creation of that power*. The meaning that the persons must take under the power, or as if their names had been inserted in the power is, that they shall take in the same manner as if the power and instrument executing the power had been incorporated in one instrument; then they shall take as if all that was in the instrument executing, had been expressed in that giving the power. So it is in appointments of uses. If a feoffment is executed to such uses as he shall appoint by will, when the will is made, it is clear that the appointee, *cestui que use* is in by the feoffment, but has nothing from the *time of the execution of the feoffment* so as to vest the estate in him. The estate will vest in him according to the nature of the act done and appointment of the use from the time of the testator's death. This, therefore, is not a relation so as to make things vest from the time of the power, but according to the time of that act executing that power; not like the referring back in case of assignment in commission of bankruptcy; that is by force of the statute, and to avoid mesne wrongful acts (*y*).

This doctrine that the appointee takes under the original deed is followed in all its consequences. Therefore, although a husband cannot at common law convey directly to his wife, yet he may make an immediate appointment to her (*z*); because her estate arises out of the original seisin; and for the same reason a wife may appoint immediately to her husband; the principle is some-

(*y*) Per Lord Hardwicke, Duke of Marlborough *v.* Lord Godolphin, 2 Ves. 61; and see Southby *v.* Stonehouse, ib. 610, accordingly.

(*z*) See Latch, 44.

thing similar to that which prevails in copyholds, where a surrender by the husband to the wife, or by the wife to her husband, is good (*a*).

So although a limitation to A for life by one instrument, and a limitation to his heirs or heirs of his body by another, cannot unite according to the rule in Shelley's case, yet a limitation to A for life by deed, and a limitation afterwards in his life time to his heirs, or the heirs of his body, under an execution of a power of appointment contained in the deed creating the life estate, will coalesce, so as to give the inheritance to A. Perhaps the nearest case to this in the old books is Pybus and Mitford, where a limitation to the heirs of the body of A was held to unite with an estate for life which resulted to him by the same deed. Mr. Fearne, in his investigation of this point, considers it clear that the limitations will unite: he treats the deed executing the power as a branch of the original settlement merely directing the operation of it, *quoad* the uses appointed, and consequently the limitations in such appointment are part of such settlement, and, by relation, virtually contained therein from the time of the appointment, only declared by way of reference to a subsequent specification thereof. He treats the rule in Shelley's case as requiring no identity of time in the declaring, but only of the instrument creating the two limitations; and to shew that the estates may vest at different times, he refers to the common case of an estate to two or more for their lives, remainder to the right heirs of the survivor of them, and the case put in 1 Inst. (*b*), that if lands be given to two during their joint lives, remainder to the heirs

(*a*) See Bunting *v.* Lepingwel, 4 Rep. 29 a. (*b*) 1 Inst. 378 b.

of

of him who shall die first, the heir will be in by *descent*, which are direct authorities that no identity in point of time of vesting of the two estates is requisite to the operation of the rule (*c*).

When these observations were made by Mr. Fearne no judicial opinion had ever been delivered on the point, but in Venables and Morris (*d*) the very question arose. Under a settlement the husband was tenant for life, remainder to trustees and their heirs generally to preserve remainder (after several uses which never arose) to such uses as the wife should appoint. She appointed to the right heirs of her husband. The court ultimately held, that the *fee simple* vested in the trustees, so that the estate limited under the power being merely equitable, could not unite with the limitation to the husband for life in the deed, which was a legal estate; but Lord Kenyon treated it as quite a clear point, that the appointment was to be considered in the same light as if it had been inserted in the original deed by which the power of appointment was created; and, therefore, he held, that if the limitation to the heirs of the husband had been a legal estate, it would have enlarged the estate in the ancestor, and given him a fee.

So, as a consequence of this rule, it has been determined, that where an estate was conveyed to such uses as A should appoint, remainder to himself in fee, yielding and paying a fee farm rent, which he covenanted to pay accordingly; and afterwards, *by virtue of his power*, he conveyed the estate to a purchaser, such purchaser was not subject to the covenant for payment of the rent,

(*c*) Contingent Remainders, 99, 4th edition.

(*d*) 7 Term Rep. 342, 438.

for although the covenant ran with the land in the first instance, yet it ceased to do so in the hands of the purchaser, as he did not take the interest of the original grantee, but took as if the original conveyance had been made to himself (*e*). This decision leads to the observation, that wherever a purchaser is to enter into a covenant which it is intended shall run with the land, the vendor ought to insist upon the purchaser taking a conveyance to himself in fee, and should not permit the estate to be limited to the usual uses (*f*) to bar dower.

Of course the beneficial interest a man takes under the execution of a power forms part of his estate, and is, like the rest of his property, subject to his debts; nor, indeed, can an appointment be made so as to protect the funds from the debts of the appointee (*g*), unless the power expressly authorizes it to be appointed to trustees for his support and maintenance, and not to be subject to his creditors.

But equity goes a step further, and holds that where a man has a *general* power of appointment over a fund, and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors, in preference to the claims of his legatees or appointees (*h*). But, in order to raise this equity, the

(*e*) Roach *v.* Wadham, 6 East, 289.

(*f*) See Treat. of Purch. 368—373, 2d edit.

(*g*) Alexander *v.* Alexander, 2 Ves. 640.

(*h*) Lassells *v.* Lord Cornwallis, 2 Vern. 465, Prec. Cha. 232; Thompson *v.* Towne, 2 Vern. 319; Hinton *v.* Toye, 1 Atk. 465; Shirley *v.* Ferrars, 2 Atk. 172; 2 Ves. 2, 8, 9; 7 Ves. jun. 503, n. cited; Bainton *v.* Ward, 2 Atk. 172, 2 Ves. 2, 7 Ves. jun. 503 n.; Lord Townshend *v.* Windham, 2 Ves. 1; Pack *v.* Bathurst, 3 Atk. 269; Troughton *v.* Troughton, 3 Atk. 656.

power

power must be actually executed, for equity, as we shall hereafter see, never aids the non-execution of a power (*i*). And although creditors in these cases prevail over volunteers, yet if a party taking under a voluntary appointment sell to a person *bona fide* and for a valuable consideration, such person in analogy to the decisions on the statute of voluntary conveyances, will be preferred to the creditors (*k*), as having a preferable equity to them.

III. Although every power operates as a power of revocation and new appointment (*l*), yet, in order to enable us to consider accurately the effect of the execution of powers on the estates in the settlement, we must here distinguish three kinds of powers, viz. first a power of revocation; secondly a power of appointment, with remainder over in default of appointment; and, thirdly, particular powers in a settlement, as powers of leasing and jointuring.

And first, as to a power of revocation: Immediately upon the execution of it the ancient uses are determined whether limited to a subject or to the King (*m*), without entry or claim, if the party who has the power is himself tenant of the freehold, as he cannot enter upon himself, and a claim is unnecessary; but it has been doubted, whether a claim is not necessary where the revoker has no interest in the land (*n*).

(*i*) Holmes *v.* Coghill, 7 Ves. jun. 499, 12 Ves. jun. 206.

(*k*) George *v.* Milbanke, 9 Ves. jun. 190; and see *infra*, ch. 9.

(*l*) See Tarback *v.* Marbury, 2 Vern. 511.

(*m*) 1 Jo. 193.

(*n*) Digges's case, 1 Rep. 173, 5th resol.; Mo. 605; Co. Litt. 237 a; and see Vernon's case, Mo. 744.

Secondly,

Secondly, as to powers with estates limited in default of their being exercised: immediately upon the execution of such a power, the estates limited in default of appointment cease, and are defeated; and the estates limited under the power take effect from the time of the execution of the power, in the same manner as if they had been contained in the deed creating the power. The estates, however, limited in default of appointment are as we have seen vested estates (*o*). Therefore, where an estate is limited to such uses as a man shall appoint, remainder to him in fee, as he is seised in fee until appointment, his wife becomes dowable; and it has been doubted, whether a subsequent appointment will drive out the wife's right of dower (*p*). It is to prevent this question arising, that in the limitations to bar dower an interposed estate is given in default of appointment, to a trustee. But we must now enquire whether the doubt is founded. There are few points upon which a greater difference of opinion has prevailed in the profession. It was formerly much debated, whether the fee was vested in the remainder-man, but that question is now at rest. Some opinions have taken a distinction between a limitation in default of and *until* appointment, and a limitation merely in default of appointment; in which last case, it has been contended, the fee does not vest; this doctrine, however, cannot be supported at the present day. It must be taken as a settled principle that the fee is vested in the husband, and the right of dower has attached. And the opinion of most of the eminent men of the times, and amongst them of the late Mr. Fearne, was, that the right of dower was defeated with the

(*o*) *Supra*, ch. 2, sect. 4. (*p*) See n. (2) Co. Litt. 216 a.

estate

estate on which it attached by the execution of the power. The opinions of the Judges on this point stand thus: In Cave and Holford, Mr. Justice Heath expressed an opinion, that the power would enable the donee to bar the claim of dower *(q)*. In Cox and Chamberlain, Lord Alvanley spoke rather dubiously of the question. He said, that by the execution of the power the estate in fee might be superseded, "though perhaps not to bar dower." Lord Eldon appears to have thought with Mr. Justice Heath, that the appointment drove out all intermediate estates, and the dowress could not sustain her claim of dower upon the new estate in the appointee of the power *(r)*. However, it has never been necessary to decide this point; and in the last case Lord Eldon said, that, notwithstanding his own opinion, if the point had arisen, he would have permitted the party to take the opinion of a court of law upon it.

Upon principle it is difficult to frame a reason in favour of the right of dower; for although the estates limited by the execution of the power take effect only from the time of the execution of the power, yet the estates limited in default of appointment cease the instant before the new uses arise (1). Perhaps the doubt may have been raised on this ground, that as a conveyance of the fee would in fact destroy the power, a

(*q*) See 3 Ves. jun. 657.

(*r*) See Maundrell *v.* Maundrell, 10 Ves. jun. 246.

(1) The doubt could scarcely be supported on Buckworth *v.* Thirkell, Coll. Jurid. 332, 3 Bos. and Pull. 652 n, if even that case itself had been rightly decided.

partial

partial charge or right attaching on it, even by operation of law, must have the effect of defeating the operation of the power *pro tanto*. And this, it is apprehended, is the principle: for it has never been contended, that where a general power of appointment is given to A, with remainder in default of appointment to B in fee, the right of dower of B's wife would not be defeated by the execution of the power. Whilst the point remains undecided it must of course be treated as doubtful, and consequently a purchaser is entitled to a fine from the vendor and his wife at his (the vendor's) expense.

Thirdly, in regard to particular powers in a settlement, as powers of leasing, jointuring, charging with portions for younger children, selling and exchanging, &c. these we may consider under two views: 1st, with respect to the operation of the powers on the limitations in the settlement, and, 2dly, in relation to their effect on each other. And, first,

I. It holds generally true that a power to create leases or any other estate to take effect in possession will controul and over-reach *all* the estates in the settlement (*s*). Thus, in a case (*t*) where lands were settled to A for life, then to trustees for a term upon such trusts as A should direct, and then to uses in strict settlement, with a power of leasing to A. A first declared the trusts of the term for payment of his debts, and then granted a lease in exercise of his power. It was objected that the estate was bound by the declaration of trust by A, and

(*s*) See the argument of Bridgman, Chief Justice, in Bosworth *v.* Farrand, Cart. 111; and see 2 Ro. Abr. 260, pl. 5; S. C. Cro. Jac. 347, nom. Fox *v.* Prickwood. (*t*) Talbot *v.* Tipper, Skin. 427.

that

that he could not afterwards execute his power so as to over-reach the term; but this was over-ruled, "for the term was originally subject to the power being contained in the same deed, and he having exercised his power, the leases are precedent to the term, and controul it."

So, in another case, where the settlement was to A for life, remainder to such woman as he should marry for life, remainder to the first and other sons in tail, remainder to A in fee, with a power to him to charge portions for younger children, which he afterwards duly exercised: it was prayed that the remainder only might be charged with the portion; but the court held, that the power and the charge made pursuant thereto did affect the wife's estate for life as well as the remainder, and that it was like a power of leasing, which over-reaches all the estates, for which reason they said it was usual to insert a proviso in such power of charging, that it shall not prejudice the jointure or other preceding estate (*t*).

Again, in the case of Mosley and Mosley (*u*), under a strict settlement by a father and his eldest son, terms of years were created to raise portions for the father's younger children. And *powers* were given to the son, subject to his father's life estate, to direct portions to be raised for his younger children. These powers were executed, and the father's younger children insisted that their portions were a prior incumbrance, as they were created by the settlement which was executed long prior to the deeds executing the powers. But Lord Alvanley, then Master of the Rolls, held otherwise. He said, that the moment the power was executed it was as if in

(*t*) Beale *v.* Beale, 1 P. Wms. 244. (*u*) 5 Ves. jun. 248.

the

the original deed, and in that way it would stand now. This power was subject to the father's life estate: therefore it must be taken as if made subsequent to the life estate of his father. As soon as he has executed that power the term created by it comes in immediately after the estate of the father before the other terms, but not before his life estate. The charge, therefore, is the first incumbrance upon the estate. Suppose the power was not for a provision for younger children, but to secure a jointure to his wife; according to the defendants that jointure would be postponed to his younger brother's fortunes. What pretence is there for that? The moment he raises the term it is put in after the life of his father to which the power is subject. He could not, he added, in point of conveyancing put it in any where else.

In a late case, where there was a strict settlement, the ultimate limitation was, to the use of the settlor in fee, "subject, nevertheless, and charged with the payment of 6000*l.* as he should appoint." It was insisted by the bill, but not relied upon in argument, that the power only operated as a charge upon the ultimate reversion. The Master of the Rolls held, that upon the true construction the reservation of the right to charge must extend to the estate in all the limitations of it, and not be confined merely to the reversionary interest limited to himself, over which he would have a disposing power at all events (*x*).

II. Where several powers have been given by the same deed, and two or more of them are executed, the

(*x*) Stackhouse *v.* Barnston, 10 Ves. jun. 453; see Forster *v.* Graham, 2 Str. 961, 2 Barn. R. R. 341, 428.

better

better opinion appears to be, that the uses limited under the powers will, in the absence of an express declaration to the contrary, take effect according to the priority of the execution of the powers by which they were respectively raised, although it is evident, that in most cases the intention of the settlement and the object of the powers must be the best guides to the construction. In the case of Yelland and Ficlis (*y*). Coke, Chief Justice, laid it down, that if one make a conveyance with a power to make leases and a power of revocation, if he make a lease (1) he may afterwards revoke for the *residue*. Indeed, it could not possibly be argued that the interest of a lessee, who is considered a purchaser *pro tanto*, would be defeated by the subsequent execution of another power by the lessor. So it would be impossible to contend, that a lease under a power could be defeated by the subsequent execution of a power in the same settlement of charging with portions, of jointuring, or even of sale and exchange. It were not easy to lay down any abstract proposition on this head, yet questions upon it seldom occur, which is attributable to the universal practice of conveyancers to express in a deed, by which several powers are created, to what uses and powers they shall severally be subject. The *dictum* in Moore is perhaps the only observation in the books on this point.

(*y*) Mo. 788.

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(1) Viner, who inserts this *dictum* in his Abridgement, after this word "lease," adds the words [of part] between brackets. There is no pretence, however, for this interpolation.

CHAPTER VI.

OF EQUITABLE RELIEF IN FAVOUR OF DEFECTIVE EXECUTIONS OF POWERS.

SECTION I.

OF THIS RELIEF WHERE THERE IS A MERITORIOUS CONSIDERATION IN THE APPOINTEE.

We have before seen that powers took their rise before the statute of uses, and were then sanctioned and protected by equity only, nor did equity suffer the statute to deprive it of this valuable branch of its jurisdiction. At law, the omission of any circumstance required to the execution of a power, was deemed fatal; but equity, where there was a good or a valuable consideration, interposed its aid, and supported the defective execution of the power. Before the limits to this equitable relief were fully established, it was speciously argued, that although the circumstances required to a power must be observed at law, yet when a man hath a power over an estate, those circumstances are only a guard upon himself that he may not be surprised into a sudden disposition of it. But when deliberately and solemnly he hath done an act whereby he disposeth of this estate, but there wants some little ceremony or circumstance, such as the not tendering 12d. or the like, a court of equity ought

ought to supply such a defect to support this solemn intention to dispose of it. For plain it is he is not surprised into this act, and so the reason for those circumstances fails, and they need not be strictly observed. But to this it was answered and resolved, that powers were similar to conditions at common law: and as a man must perform a condition at common law to intitle him to re-enter, he must execute his power to intitle him to a revocation. And a court of equity can no more let a man in to defeat an estate upon a power of revocation, without a due execution of the power, than the common law could let in a man to defeat an estate upon a condition, without performance of the condition; or than a court of equity can permit a man to defeat a voluntary conveyance without a power of revocation; for it is all but a condition which must be performed, or no advantage taken of it; and a court of equity may do great things, but they cannot alter things, or make them to operate contrary to their essential natures and properties (*a*).

In modern times it has been contended, that whatever is an *equitable*, ought to be a *legal* execution of a power (*b*): because, as Lord Mansfield observed, there should be a general rule of property; and if the courts of equity say we will presume, that where the execution is for a meritorious consideration, a strict adherence to the precise form was not intended, and therefore it is not necessary, the moment the same rule is fixed and adopted at law, every man who creates, and every man who is

(*a*) See 3 Cha. Ca. 66, 67, 107, 108.

(*b*) Zouch v. Woolston, 2 Burr. 1136.

to exercise a power, understands what he is to do (*c*). And he considered, that where there was a meritorious consideration, it was not necessary, even at law, strictly to adhere to the precise form (*d*). The vice of this reasoning is, that equity itself does not hold the power well executed, unless the form is adhered to; but where the execution is for a meritorious consideration, compels the person seised of the estate in default of execution of the power to make good the defect—a jurisdiction which courts of law cannot assume, because they have no means of enforcing its observance. At the present day, however, Lord Mansfield's doctrine is completely exploded: equity alone can relieve against a defective execution of a power, and that only where there is a meritorious consideration in the person applying for the aid of the court.

The Master of the Rolls, with his usual precision, has strongly observed, that it is difficult to discover a sound principle for the authority which equity assumes for aiding a defective execution in certain cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed wherever it is manifested; for the owner of the estate has nothing to do with the purpose; to him it is indifferent whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why, in any case, exercise the power, except in the form and manner prescribed? He is an absolute stranger to the equity between the possessor of the power, and the party in whose

(*c*) Cowp. 267. (*d*) Cowp. 269.

favour

favour it is intended to be executed. As against the debtor it is right that he should pay (1). But what equity is there for the creditor to have the money raised out of the estate of a third person in a case in which it was never agreed that it should be raised. The owner is not heard to say it will be a grievous burthen, and of no merit or utility. He is told the case provided for exists, it is formally right, he has nothing to do with the purpose. But upon a defect which this court is called upon to supply, he is not permitted to retort this argument, and to say it is not formally right, the case provided for does not exist, and he has nothing to do with the purpose. In the sort of equity upon this subject, there is some want of equality. But the rule is perfectly settled, and though perhaps with some violation of principle, with no practical inconvenience.

Thus, then, the jurisdiction stands, and we may now enquire what amounts to such a consideration as will enable equity to interpose its aid in favour of a defective execution of a power.

I. In Chapman *v.* Gibson (*e*), Lord Alvanley laid it down that the execution of a power and a surrender of a copyhold go hand in hand precisely on the same ground, consequently the same relief is to be granted in cases of a defective execution of a power, and the want of a surrender of a copyhold. The aid of equity then will be afforded to a purchaser (*f*), which term includes

(*e*) 3 Bro. C. C. 229.

(*f*) Fothergill *v.* Fothergill, 2 Freem. 257; Anon. ib. 224; 3 Cha. Ca. 68; Cowp. 267.

(1). The question was, whether the Court would execute a power in favour of creditors.

a mortgagee and a lessee (1) (*g*), and to a creditor (*h*). The like aid will be afforded to a wife (*i*), or husband (*k*), and to a legitimate child (*l*), and although to constitute a valuable consideration *for a settlement* on a wife or child, it must be made *before* marriage; yet the marriage and blood are meritorious considerations, and claim the aid of a court of equity in support of a defective execution of a power in their favour (*m*), although the power was executed after the marriage.

But the same equity cannot be extended to a natural child (*n*); nor, as it has at length been determined, to a grandchild (*o*), neither will it extend to a brother or sister

(*g*) *Barker* v. *Hill*, 2 Cha. Rep. 113; *Bradley* v *Bradley*, 2 Vern. 163; *Taylor* v. *Wheeler*, 2 Vern. 564; and *Jennings* v. *Moore*, ib. 609; Reid *v.* Shergold, 10 Ves. jun. 370.

(*h*) Fothergill *v.* Fothergill, *ubi sup.* 3 Cha. Ca, 89; Pollard *v.* Greenvil, 1 Cha. Ca. 10, 1 Cha. Rep. 98; Wilkes *v.* Holmes, 9 Mod. 485; *Ithell* v. *Beane*, 1 Ves. 215; *Bixby* v. *Eley*, 2 Bro. C. C. 325; 2 Dick. 698.

(*i*) Cowp. 267; Fothergill *v.* Fothergill, 2 Freem. 256; Lady Clifford *v.* Earl of Burlington, 2 Vern. 379; Coventry *v.* Coventry, 2 P. Wms. 222; and see *ib.* 705.

(*k*) Sargeson *v.* Sealey, 2 Atk. 412.

(*l*) Sarth *v.* Lady Blanfray, Gilb. Eq. Rep. 165; Sneed *v.* Sneed, Ambl. 64; Cowp. 264, 265, cited, and see Cowp. 267.

(*m*) Fothergill *v.* Fothergill, 2 Freem. 256; and Hervey and Hervey, 1 Atk. 561.

(*n*) *Fursaker* v. *Robinson*, Prec. Cha. 475; *Tudor* v. *Anson*, 2 Ves. 582.

(*o*) *See Kettle* v. *Townesend*, 1 Salk. 187; *Watts* v. *Bullas*, 1 P. Wms. 60; *Freestone* v. *Rant*, *ib.* 61 n.; 3 Bro. C. C. 231; *Fursaker* v. *Robinson*, Prec. Cha. 477; *Tudor* v. *Anson*, 2 Ves. 582; *Chapman v. Gibson*, 3 Bro. C. C. 229; *Hills* v. *Downton*, 5 Ves. jun. 567; *Perry* v. *Whitehead*, 6 Ves. jun. 544; and see 1 Watk. Copyh. 136, 138.

(1). The cases in italics were decided upon copyholds.

even

even of the whole blood (*p*), much less of the half blood (*q*), nor to a nephew (*r*), or cousin (*s*), and *a fortiori*, it cannot be afforded to a mere volunteer (*t*).

We have seen that this equity extends to *creditors*; and where a man having a general power of appointment, duly executes it in favour of a stranger, equity will lay hold of the funds in the hands of the appointee, for the benefit of the creditors of the person executing the power (*u*); but where the power is *not* executed, equity cannot assist the creditors (*x*). Upon this doctrine Lord Erskine in a late case started an ingenious question, whether if the power be informally executed in favour of a stranger, equity can first grant the relief at the suit of the creditors, so as to vest the fund in the appointee, and then convert him into a trustee of it for the creditors; and he appeared to think that this might be done (*y*). There is no authority however for this circuitous relief, and it may well be doubted whether it will ever be granted. Where the fund is *effectually* given to a stranger, equity considers him a trustee of it for the creditors. In this case the remainder-man has no ground of complaint, as the power is legally executed. Where a defect is supplied for the appointee, the relief

(*p*) *Goodwyn* v. *Goodwyn*, 1 Ves. 228.

(*q*) *Goring* v. *Nash*, 3 Atk. 189; which overruled *Watts* v. *Bullas*, *ubi sup.*

(*r*) *Strode* v. *Russell*, 2 Vern. 621; *Marston* v. *Gowan*, 3 Bro. C. C. 170; and see Piggot *v.* Penrice, Com. 250.

(*s*) *Tudor* v. *Anson*, 2 Ves. 582.

(*t*) Smith *v.* Ashton, 2 Freem. 309; see 3 Cha. Ca. 113, 126; Sargeson *v.* Sealey, 2 Atk. 415; Godwin *v.* Kilsha, Ambl. 684; Reg. Lib. A. 1768, fol. 495.

(*u*) *Vide* ch. 5. sect. 8.

(*x*) *Vide infra*, sect. 3.

(*y*) Holmes *v.* Coghill, 12 Ves. jun. 206.

has at least the merit of effectuating the intention of the person executing the power, although at the expense of the remainder-man; but if this relief should be afforded in favour of creditors, where the fund is not given to them, the same hardship would be imposed on the remainder-man, and at the same time the intention of the donee of the power would be defeated. Upon this head of equity, it is clearly established that the interests of the remainder-man shall only be sacrificed to the intention of the donee of the power expressed in favour of a person from a valuable consideration moved, or in whose person a good consideration existed. The first point to be established is the intention of the person executing the power, which in this case is not merely wanting, but his intention expressly was, that his creditors should not have the fund. The common equity in favour of creditors, where the fund is given to others, does not arise until the power is legally executed. The limits of the law on this head appear to be contained in the decided cases.

Although the appointee may *prima facie* be entitled to the aid of the court (z), yet to prevail, he must have a preferable *equity* to the person against whom he seeks the relief. Therefore where a father agreed to settle an estate on his wife and children, but neglected to do so, and afterwards prevailed upon his eldest son, who was ignorant of the agreement, to settle the estate in a different way, whereby the father had a power of jointuring, which upon his second marriage he agreed to execute; the agreement after his death was decreed to be specifically executed by the son, who was the remainder-man

(z) See Shadwell's case, 1 Ves. 281, cited; and see Hervey *v.* Hervey, 1 Atk. 568.

under

under the settlement, but this decree was reversed in the House of Lords (*a*) (1). The son was seised of the legal estate, and he had as good an equity to retain the estate discharged of the jointure, as the wife had to have the defect supplied.

So although there is a meritorious consideration in the appointee, yet if the donee of the power after a defective execution of it, *legally* execute it in favour of a *bona fide* purchaser or mortgagee without notice, the court cannot interfere; for by the last execution the purchaser obtains the legal estate; and as he has equal equity with the first appointee, he cannot be disturbed. But if previously to paying his money, or to the execution of the power, he have notice either express or implied, of the prior appointment, equity will compel him, on the ground of fraud, to convey the estate to the first appointee, so as to make good the defect in the appointment to him (*b*).

And where trustees with a power of sale enter into a

(*a*) Jevers *v.* Jevers, Dom. Proc. 1734.

(*b*) As to what amounts to notice, see Treat. Purch. 2d. edit. ch. 17.

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(1) The principle in the text is clear, and Jevers and Jevers is stated in Gro. and Rud. of Law and Equity, p. 19, as having been decided on the ground of the fraud in the father; but from the printed cases it appears that the settlement was made in consideration of the son waving the agreement entered into upon his mother's marriage, and the bond for settling the jointure had no reference whatever to the power, upon which perhaps the case turned. However, the author of the above book, who lived in the time when the decision was made, most likely knew the ground to which the decision was generally referred. The above case is in 4 Bro. P. C. 199, by the name of Ivers *v.* Ivers, which difference arose from the printed cases. In the appellant's case, the cause is entitled Jevers *v.* Jevers, in the respondent's Ivers *v.* Ivers.

contract for sale of the estate, which would be deemed a breach of trust, equity will not only refuse to interfere in favour of the purchaser, but will even at the suit of the *cestuis que trust*, restrain the trustees from executing the contract, and the purchaser will be left to his remedy at law (*c*).

Upon this subject of equitable relief, a question has often arisen, whether a party be intitled to the relief who is already provided for; but it is well settled, that of the *quantum* of provision, the parent or husband is the best judge (*d*). It has, however, been long *vexata questio*, whether a surrender can be supplied against *an heir totally unprovided for* (*e*). In Chapman and Gibson, Lord Alvanley considered that the heir could not be relieved against. The principle, he said, must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it; but we will not compel him to fulfil one obligation at the expense of another; and if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim of the wife or other children. In a late case (*f*), Lord Rosslyn considered it equally clear that the court could not enter into the question, whether the heir was or was not provided for; but it was not necessary to decide the point. Lord Al-

(*c*) See Mortlock *v.* Buller, 10 Ves. jun. 292; and see Stratford *v.* Lord Aldborough, 1 Ridg. P. C. 281; Brian *v.* Acton, 5 Vin. Abr, 533, pl. 33.

(*d*) *Kettle* v. *Townesend*, 1 Salk. 187; *Andrews* v. *Waller*, 6 Vin. Abr. 237, pl. 12; *Tudor* v. *Anson*, 2 Ves. 582; *Smith* v. *Baker*, 1 Atk. 385; *Chapman* v. *Gibson*, 3 Bro. C. C. 229.

(*e*) *Kettle* v. *Townesend*, 1 Salk. 187; *Hawkins* v. *Leigh*, 1 Atk. 387.

(*f*) *Hills* v. *Downton*, 5 Ves. jun. 557.

vanley,

vanley, however, did not subscribe to Lord Rosslyn's doctrine, but still retained his opinion, that an heir could not be compelled to supply the surrender where he could shew that the consequence would be (he being a son wholly unprovided for), that he would be compelled to fulfil the intention of his father in discharge of a moral or natural obligation in favour of a widow, or of his brothers or sisters, when it was manifest that he had neglected to discharge the obligation he was under of providing for him his eldest son *(g)*. This question, therefore, is still very doubtful; nor is it easy to conjecture which way it will be decided. They who advert to principle will probably agree with Lord Alvanley, whilst those who regard practical inconvenience, will coincide with Lord Rosslyn, as certainly endless difficulties will be introduced if the court is to inquire into the circumstances of the heir at law.

It is clear, however, that this question can never arise where the heirs are persons for whom the testator is under no natural or moral obligation to provide, as where the heir is a nephew or niece (*h*). But if the enquiry is to be made, it should seem that a grandchild will be within the principle, although a surrender or a defect in the execution of a power cannot be *supplied* in his favour. Lord Rosslyn has decided that daughters are provided for when married (*i*), nor is it necessary that the heir should be *disinherited*, for if he *is* provided for, it is immaterial from whom the provision moved (*k*),

(*g*) See, App. No. 6, the observations of Lord Alvanley on Hills and Downton, written with his own hand.

(*h*) *Chapman* v. *Gibson*, *ubi sup.* *Smith* v *Baker*, 1 Atk. 385.

(*i*) Hills *v.* Downton, 5 Ves. jun. 557.

(*k*) *Hawkins* v. *Leigh*, 1 Atk. 387; *Chapman* v. *Gibson*, 3 Bro. C. C. 229; *Pike* v. *White*, *ib.* 286.

Important,

Important, however, as this question is, and frequently as it will probably arise on copyholds, yet it is a point that can seldom occur in relation to powers. For questions as to aiding defective executions of powers, generally arise upon particular powers in settlements where the estate subject to the power is either settled on the heirs of the person creating the power, or on strangers: If it be settled on the heirs, then they are provided for under the settlement; and if it be settled on strangers, *they* cannot require a provision, so that in either case the defect may be supplied, although it should be determined that the relief cannot be granted against an heir totally unprovided for. Indeed, in the case of Carter *v.* Carter (*l*), Sir Joseph Jekyll addressing himself to this point, said, that where a younger child comes into equity to have the want of a surrender of a copyhold supplied, he must be wholly unprovided for, or have but a very slight provision, though there had been great variety of opinions upon this point, and where all the children have been well provided for, the court has supplied the want of a surrender against the heir, because the father was the best judge in which manner to provide for his children; and he believed Lord Cowper was the first who refused it, because the younger child was greatly provided for, and the heir had little or nothing; *but he had never known this distinction made, or that the court would enter into the consideration of it where the younger child has applied to have a defective execution of a power made good.* It is impossible, however, to administer a different equity in these cases. They stand on precisely the same ground. We have Lord Alvanley's authority for this (*q*). The same doc-

(*l*) Mose. 365. (*q*) Chapman *v.* Gibson, 3 Bro. C. C. 229.

trine

trine was laid down by Lord Chancellor King (*r*), and adopted by Lord Camden (*s*).

In Mac Adam *v.* Logan (*t*), a power was given to appoint a fund amongst *such* child or children of the marriage as the donee should choose, and in default of appointment the fund was given to all the children equally. The power was defectively executed, as the appointment was not sealed according to the power, and Lord Thurlow, it is said, seemed to think that the want of a seal could not be supplied between persons having equal equities, though it might against an heir at law or remainder-man: but being all *children*, it was like a naked power. The case, however, was decided upon another ground: and it should seem that Lord Thurlow's opinion cannot be supported, for surrenders of copyholds and executions of powers in this respect go hand in hand; and it is well established, that as to copyholds the same equity shall be administered against a younger son as against an eldest (*u*). Therefore, if the children are entitled in the same way as heirs in gavelkind, the defect will be supplied in favour of any of the children, in the same manner as in common cases it would be supplied against the heir at law (*x*). So, if the case before Lord Thurlow had turned on that point, the defect ought to have been supplied on precisely the same principle; the mere circumstance of all the parties being children was not material, for those to whom the

(*r*) Cotter *v.* Layer, 2 P. Wms. 623, third point.

(*s*) Godwin *v.* Kilsha, Ambl. 684.

(*t*) 3 Bro. C. C. 310.

(*u*) See 2 Vern. 165; and Drake *v.* Robinson, 1 P. Wms. 443.

(*x*) Bradley *v.* Bradley, 2 Vern. 163; Andrews *v.* Waller, 6 Vin. Abr. p. 237, pl. 12.

fund

fund was not appointed were *quoad* this relief remainder-men; and then, unless they were totally unprovided for, *and Lord Alvanley's opinion were to prevail,* they ought to have been decreed to make good the defect. Lord Chief Justice Holt may be thought to have been of the same opinion as Lord Thurlow. In Mountague *v.* Bath (*y*) he put this case. A man settles *all* his estate upon his younger son for life, with a power to revoke, and then, by defective execution, he gives all the estate to his eldest son, is this a good revocation in equity? And he answered, No; for the one is as nearly related to the father as the other, the considerations are equal, the one is as much the son as the other, and, therefore, there is no great difference between them, and the younger son, who hath the estate by law shall enjoy it, though afterwards it return back to him that was the eldest. Now, as Holt put this case, it embraced *all* the ancestor's estate, so that if the defect had been supplied the younger son would have been totally unprovided for, and this must have been the ground of Holt's opinion, for if his opinion were to be adopted as a general rule, it is evident that the court would never supply a surrender against an eldest son in favour of younger children; indeed, the same argument, precisely, was formerly urged against supplying a surrender to the prejudice of an eldest son; it was insisted, that he was as nearly related as his brother, and having the law of his side equity ought not to interpose (*z*), but this doctrine never gained a footing.

(*y*) 3 Cha. Ca. 55; and see 2 Ves. 75.

(*z*) See Fothergill *v.* Fothergill, 2 Freem. 257.

If

If under an *equitable* settlement a power of charging money for his own use be given to tenant for life, and he covenant to discharge the estate from certain incumbrances on it, it seems that an execution of the power for valuable consideration *before breach of the covenant*, would be enforced in equity, although it should be afterwards broken; but it is doubtful whether this would be done if the covenant was previously broken, as the person lending the money ought to have enquired whether the covenant was performed, and clearly a person not actually advancing money on the faith of the power, but obtaining an execution of it after breach of the covenant to patch up a former security, will not be entitled to the aid of equity against the remainder-man who takes the estate charged with the incumbrances of which it ought to have been cleared (*a*).

II. Having considered for whom a defect will be supplied, we must now consider in what cases it will be made good *with reference to the instrument*, merely premising, that where there are several defective executions, equity will supply the defect in the last, in order to effectuate the intent of the parties (*b*). And it is only necessary that the intention to execute the power should appear clearly in writing: whether the donee of the power only covenant to execute it (*c*), or by his will

(*a*) Bradbury *v.* Hunter, 3 Ves. jun. 187, 260.

(*b*) Hervey *v.* Hervey, 1 Atk. 561.

(*c*) Fothergill *v.* Fothergill, *ubi sup.*; Lady Beaufoy's case, 2 Vern. 465, cited; Alford *v.* Alford, 2 P. Wms. 230, cited; Coventry *v.* Coventry, Francis's Max. last case, 2 P. Wms. 222, Gilb. Eq. Rep. 160, 1 Str. 596, 9 Mod. 12; Sargeson *v.* Sealey, 2 Atk. 412.

desire

desire the remainder-man to create the estate (*d*), or merely enter into a contract, not under seal, to execute his power (*e*), or by letters promise to grant an estate which he can only do by an exercise of his power (*f*), equity will supply the defect. So, if in a deed appointing part of the estate to one of the objects, the donee recite that another of the objects is entitled to a particular share of the fund, that will be held a good appointment in equity, as it demonstrates an intention to give that share accordingly (*g*). So an answer to a bill in Chancery, stating, that "he does appoint, and intends by a writing in due form to appoint," the fund in a particular manner, was held to be binding although the power was required to be executed by writing under hand and seal attested by two witnesses (*h*). The court considered the words *do appoint* as a present defective appointment, and that the words *intend to appoint* did not derogate from that actual appointment, or shew that it would not avail, but only that he would afterwards execute it in the precise form. And where a man made a settlement of an estate to uses in strict settlement, and reserved a power by deed or will executed in the presence of two witnesses, to appoint any of the lands for raising portions for his younger children to be paid as he should by such deed or will appoint, and by the settlement *covenanted to do so accordingly*, this covenant was held to be an

(*d*) Vernon *v.* Vernon, Ambl. 1.

(*e*) Shannon *v.* Bradstreet, 1 Rep. Temp. Redesdale, 52; and see Mortlock *v.* Buller, 10 Ves. jun. 292; and see Coventry *v.* Coventry, Max. Eq. per Sir Joseph Jekyll.

(*f*) See and consider Campbell *v.* Leach, Ambl. 740, App. No. 7.

(*g*) Wilson *v.* Piggot, 2 Ves. jun. 351.

(*h*) Carter *v.* Carter, Mose. 365; and see Fortescue *v.* Gregor, 5 Ves. jun. 553.

equitable

equitable execution of the power, although he died without doing any further act (*i*). This case evinces that the branch of equity on which it depended is not confined within very narrow bounds. And whatever solemnities are required to the execution of the power, yet a sale of the funds, and payment of the produce to the object of the power, at the request of the donee, is in equity tantamount to a valid legal appointment (*k*).

But to enable equity to relieve there must, as in the case of a regular execution (*l*), be a sufficient reference to the fund to shew the party's intention to execute the power, or the party must be in possession of no other fund upon which the covenant can operate (*m*).

Powers of jointuring to be exercised when in possession, are frequently agreed to be executed by *remaindermen* whose right of possession has not accrued, and equity cannot make good the appointment, unless the party afterwards actually do come into possession (*n*).

The leading case on this subject is Coventry *v.* Coventry (*o*), where a devisee with a power of jointuring to

(*i*) Doctor Sarth *v.* Lady Blanfrey, Gilb. Eq. Rep. 166, cited.

(*k*) Routledge *v.* Dorril, 2 Ves. jun. 357.

(*l*) *Vide supra*, ch. 5, sect. 5.

(*m*) Jackson *v.* Jackson, 4 Bro. C. C. 462; Hele *v.* Hele, or Elliott *v.* Hele, 2 Cha. Ca. 28, 29, 87; 1 Vern. 406 (1).

(*n*) Jackson *v.* Jackson, *ubi sup.*; and see Alford *v.* Alford, 2 P. Wms. 230, where Francis survived Thomas; see 4 Bro. C. C. 466; and see 1 Rep. T. Redesdale, 63.

(*o*) Coventry *v.* Coventry, 2 P. Wms. 222, *et ubi sup.*

(1) In the report of this case in Vernon, the Chancellor takes up the objection as if the *power* was general, but this certainly could not have been an objection. It seems that it was the *covenant* which was general, and the covenantor had other lands besides those comprised in the power. Mr. Powell has noticed this inaccuracy, Pow. 183—187.

the

the extent of 500*l.* a year, upon a treaty for marriage by articles in consideration of a marriage portion, covenanted that he or his heirs would after the marriage, according to his power, *or otherwise,* convey and appoint estates of 500*l.* per annum upon his wife for her jointure. A part of the estate was afterwards selected, and the appointment prepared and engrossed, but never executed. And Lord Chancellor Macclesfield, the Master of the Rolls, Baron Price, and Baron Gilbert, held, that the articles operated as a lien upon the estates selected, in the hands of the remainder-man, and that the defect ought to be supplied. They considered the words "or otherwise" as auxiliary to the real lien, viz. that if his power should happen to be insufficient to settle 500*l.* a year, that then it should be done by some other means. It was true he had election to raise the jointure out of his own assets, or out of his power; but it seemed plain, that he intended to raise it out of his power, and the deed prepared was sufficient to shew that intention.

The same relief is afforded in cases where the power is actually executed, but lands to the value agreed to be settled by articles are not comprised in the power. The wife will be relieved against the remainder-man to the extent of the deficiency (*p*), for articles are executory, and there is no difference between articles unexecuted *in toto,* or in part only; nor is it material if in these cases the appointee has taken a collateral covenant from the donee of the power that the lands are of the stated value (*q*).

(*p*) Marchioness of Blandford *v.* Duchess of Marlborough, 2 Atk. 542.

(*q*) Lady Clifford *v.* Earl of Burlington, 2 Vern. 379. This case was not entirely approved of by the Master of the Rolls in Evelyn *v.* Evelyn, 2 P.Wms. 668, but is confirmed by Lord Hardwicke's opinion in the Marchioness of Blandford's case.

If

If the husband is to become entitled to the wife's fortune in consideration of the jointure, and the wife cannot obtain the jointure, she will be entitled to retain her property against her husband (*r*): while the obligations of the husband remain unperformed, neither he nor any person claiming under him, will be permitted to receive any part of the wife's fortune upon any other condition than that of making good the settlement (*s*).

Where the contract to execute the power is merely by parol, it is doubtful whether it will bind the remainder-man, *although it is in part performed* by the intended appointee; as where a lease is agreed to be granted by parol under a power, and the lessee expend money in improvements during the life of the person who agreed to grant the lease (*t*). But if after his death the remainder-man, with full knowledge of the defect, lie by, and suffer the lessee to improve the estate by rebuilding or otherwise, equity will, on the ground of fraud, compel him to grant a new lease to the lessee (*u*). In 1781, Lord Kenyon gave an opinion, that a lease by *parol* from year to year by tenant for life with a power, was, since the case of Leach *v.* Campbell, binding in equity on the remainder-man; and that, consequently, the executors of the tenant for life, who died in the middle of a half year, were not entitled to an apportionment, but the rent would go to the remainder-man. He added, that he believed this point had been determined, and that sometime ago he concurred with Mr. Dunning and Mr. Maddocks in an opinion to the effect of that he had then given. In a late case the very point arose, but it was

(*r*) Holt *v.* Holt, 2 P. Wms. 648.
(*s*) Mitford *v.* Mitford, 9 Ves. jun. 87.
(*t*) Shannon *v.* Bradstreet, *ubi sup.*
(*u*) Stiles *v.* Cowper, 3 Atk. 692, *vide infra*, sect. 2.

not necessary to decide it (*x*). The opinion of the court, however, appeared to be, that the remainder-man was not bound by the lease, and, therefore, was not entitled to the rent. And it seems clear, that the case will be so decided should it ever call for a decision. A mere tenant from year to year does not seem to come within the class of persons entitled to the aid of equity (*y*), although certainly in Campbell *v.* Leach, Lord Chief Justice De Grey said, that such a tenant might be deemed a purchaser.

And here it must be observed, that as a contract to execute a power will bind the remainder-man, so where it can be executed in his favour, as in the case of an agreement to grant a lease, or sell an estate, the court will compel the execution of it on his behalf (*z*); although this seems formerly to have been doubted (*a*). In

(*x*) Billing *v.* Earl of Macclesfield, Rolls, 5 Feb. 1807, MS.
(*y*) *Vide post*, div. 111.
(*z*) Shannon *v.* Bradstreet, 1 Sch. and Lef. 52.
(*a*) Stamford *v.* Omly, 1 Rep. T. Redesdale, 65 cited; and Campbell *v.* Leach, Ambl. 749 (1).

(1) In this case Lord C. J. De Grey, after holding that the *lessee* might inforce the contract against the remainder-man, is made to say, "And I do not know that the remainder-man could on his part enforce the contract of such tenant for life. I had at first some doubt of this point, but own myself satisfied by what was said in answer." In a late case Lord Redesdale said, that he suspected these additional words were not uttered by the Lord Chief Justice; Shannon and Bradstreet, *ubi sup.* It is evident, however, that they were, and it seems clear, that his opinion was exactly contrary to what it is stated to have been. It is manifest from the frame of the sentence, that he said he did not now

In some cases this equity may be very beneficial to the remainder-man. Suppose a power to make a jointure not exceeding 1000*l.* per annum, with a proviso, that if there were no execution of the power, and if the tenant for life should die leaving a widow, that she should have 500*l.* per annum: and suppose a contract made upon the marriage of the tenant for life to charge 400*l.* for her under the power, which would be a less provision than she would have if the power had not been executed: Lord Redesdale, who put this case, conceived that the widow could not say she was not bound (*b*).

In none of the cases we have yet examined was the power attempted to be legally executed by a formal instrument, in the manner required by the power. The same relief, however, is granted where an attempt is made to execute the power, but there is a defect in the mode of execution; as where the power ought to be executed by deed, but is executed by will (*c*), or the in-

(*b*) 1 Sch. and Lef. 63, 64.

(*c*) Tollet *v.* Tollet, 2 P. Wms. 489; Mose. 46, S. C.; Sneed *v.* Sneed, Ambl. 64, Cowp. 264, 265, cited, (11).

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know that the remainder-man could *not* enforce the contract. This will appear clearly on a perusal of the whole sentence in the report. The omission of the word *not* was probably an error of the press.

(11) This case stands thus in the Register's book. Power to husband and wife, or the survivor, by any *deed or deeds* duly executed to charge upon the lands any sums not exceeding 3000*l.* The husband who survived, by his *will* declared, that the 3000*l.* charged upon the estate should be disposed of for his younger children's fortunes. They had portions out of other estates. The Lord Chancellor declared that the power was defectively executed by the testator's will, but that such defect ought to be made good in a Court of Equity, and that the said 3000*l.* was well charged by the testator's will for the benefit of the said younger children. Reg. Lib. B. 1747, fol. 442, Sneyd *v.* Trevor.

strument is required to be attested by three witnesses, whereas it is only attested by two (*d*), or the will ought to be under seal, but consists merely of notes in writing, which are found to be the will of the party (*e*); and although the subject of the power be real estate, yet this relief is afforded as well where the defective instrument is a will, as where it is an act *inter vivos* (*f*). It has, indeed, been lately contended, that equity cannot relieve against a defective execution where it ought to be executed by will. It is amongst other arguments insisted, that if a power over real estate is to be exercised by will, inasmuch there can be no will at all of such property, unless it be perfected in the manner prescribed by the statute of frauds; if a will be made without being so perfected, it is as if the power were attempted to be executed by a *totally different instrument* from that to which it was expressly made subject (*g*). No authority is cited for this position, and perhaps the only one in the books is a *dictum* by Gilbert in Lady Coventry's case (*h*), who lays down the same rule in his Lex Prætoria (*i*). He says, that if the power be to be executed by a will in writing, there it must have the circumstances required by the statute of frauds and perjuries to a will in writing that passes lands, because

(*d*) Parker *v.* Parker, Gilb. Eq. Rep. 168; Cotter *v.* Layer, 2 P Wms. 623; Mosc. 227; Sargeson *v.* Sealey, 2 Atk. 412; Godwin *v.* Fisher, 1 Bro. C. C. 367 cited, must be the same case as Godwin *v.* Kilsha, Ambl. 684, Reg. Lib. A. 1768, fol. 495; Wade *v.* Paget, 1 Bro. C. C. 363.

(*e*) Smith *v.* Ashton, Finch, 273, 3 Keb. 551, 1 Cha. Ca. 263, 264, 1 Freem. 308; see 3 Cha. Ca. 69, 106.

(*f*) Wilkes *v.* Holmes, 9 Mod. 485; 1 Rep. Temp. Redesdale. 60 n.; 1 Dick. 105; and see 2 P. Wms. 228, *arguendo*.

(*g*) Rob. on Stat. of Frauds, 330.

(*h*) Fra. Max. p. 5.

(*i*) P. 301.

otherwise

otherwise it is no will, and, therefore, cannot charge the lands as a will, since such wills are made void by the statute; and, therefore, the court of equity cannot break in upon those solemnities. But the authorities to which he refers do not bear him out, and the principal point was solemnly determined in the year 1752 by Lord Hardwicke in the case of Wilkes and Holmes (*k*), where the power rode over real estate, and was expressly required to be executed by will duly executed. Lord Hardwicke, after time taken to consider, held, that the defect might be supplied. He said, that where a will is to operate by way of appointment it takes no effect from the statute, though the rules prescribed by the statute might, as in the case before him, be arbitrarily inserted by the party; and that the appointee cannot claim under the will, but by the deed of settlement directing the execution of the power; which deed, together with the instrument executing the power, make in effect but one in raising the charge upon the land; but that in point of law, the charge is created by the deed directing the execution of the power. The statute of frauds, he repeated, was entirely out of the question, except so far as it is the rule which the donee is directed to follow in the execution of the power. Lord Redesdale lately observed, that this case has been acted upon ever since (*l*).

Nor is this equitable relief confined simply to defects in the instrument executing the power, for equity will in some cases relieve where a different kind of estate or interest is given than what is authorised by the power. But these cases must be considered in another place.

(*k*) Wilkes *v.* Holmes, 9 Mod. 485; 1 Dick. 165. (*l*) 1 Sch. and Lef. 60.

And equity will not only relieve against a defective execution of a power, but will, on the general rule, rectify a settlement itself where a mistake has been made in it so as to render a power inoperative, or partly to defeat the intent of it, and parol evidence will be admitted to prove how the mistake arose (*m*).

The student will not fail to have observed, that in none of the cases stated was the intention of the person *creating* the power defeated. If the power be given to be executed by deed, to him it is immaterial whether it be executed by deed or will; if three witnesses be required, to him it is unimportant whether it be executed in the presence of three or two, so *that the interest created is authorized by the power,* for equity will not relieve against the defect if the donee has been surprized into the act. But equity cannot uphold an act which would defeat the intention of the person creating the power. Thus, in Reid *v.* Shergold, a devisee having a life estate in a copyhold, with a power of appointment by *will,* sold and surrendered the estate to a purchaser, and after her death the question was, whether the purchaser could be relieved against the defect. Lord Eldon determined that he could not. His Lordship said, " that the testator did not mean she should so execute her power. He intended that she should give by will or not at all, and it was impossible to hold that the execution of an instrument or deed, which if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of ex-

(*m*) Rogers *v.* Earl, Treat. Purch. 113, 2d edit. stated from Reg. Lib.; and see Prince and Green, 3 Cha. Ca. 91, cited; Countess of Oxford *v.* Lady Bruce, 1 Freem. 308 cited; Scambler's case, Toth. 166; and see Wilmer *v.* Kendrick, 1 Cha. Ca. 159.

cution

ecution to the moment of her death, could be considered in equity, an attempt in or towards the execution of the power (*n*)." The distinction between this case and the case of a power executed by will, though required to be executed by deed, is marked and obvious.

III. Here we must stop to enquire whether equity will in every case, where there is a meritorious consideration, supply the defect whatever be the *nature* of the power. It is well settled, that defects shall be supplied where the power is to jointure, to raise portions, to sell an estate, to revoke uses, or to appoint the estate itself generally; and indeed the only doubt is, how far a defective execution of a power of leasing can be aided.

Thus far is clear, that in the construction of powers *originally* in their nature *legal*, courts of equity must follow the law, be the consideration ever so meritorious; for instance, powers to a tenant in tail to make leases under the statute, if not executed in the requisite form, no consideration ever so meritorious will avail: So with respect to powers under the civil list act, powers under particular family intails, as the case of the Duke of Bolton, &c. equity can no more relieve from defects in them, than it can from defects in a common recovery (*o*).

The material question, however, to be considered, is, whether equity can relieve against a defective execution of the usual power of leasing in settlements. An opinion has very generally prevailed in the profession, that, as

(*n*) Reid *v.* Shergold, 10 Ves. jun. 370; see Stratford *v.* Lord Aldborough, 1 Ridg. P. C. 281.

(*o*) Per Lord Mansfield, Cowp. 267; and see accordingly Anon. 2 Freem. 224.

Mr. Powell expresses it (*o*), "the lessee under the power must stand or fall by that title *only*, and if that will not bear him through, as *effectually* made under a complete and perfect execution of the power, the right of the remainder-man to possess the estate free from the lease will take place of the right of the lessee, as superior to it. For in this case the lessee has no claim to any equitable interposition in his favour, but must rest his title on the legal execution of the power." And this opinion seems, at first view, to derive some support from the case of Temple *v.* Baltinglass (*p*), where a bill filed to supply a defective execution of a power to make leases which had been held void at law, was dismissed with costs: but there appears to have been great lachess on the part of the tenant, and *some of the estates leased were not authorized to be leased by the power.* So in Doe *v.* Sandham (*q*) a lease under a power was set aside at law, because the power required the leases to contain *usual and reasonable* covenants, and a covenant was contained in the lease which the jury found to be an *unusual and unheard of covenant* on the part of the lessor. The lessee filed his bill in the Court of Exchequer against the remainder-man, who had recovered at law, to have the unusual covenant struck out of the lease. But the bill was dismissed (*r*).

On the other hand, in a case in 1698, the Master of the Rolls took this distinction, that where a lease is made purely voluntary, and no provision for a child, there if the lease be not good at law, it shall never be made

(*o*) Pow. Powers, p. 389.

(*p*) Finch, 275; and see Pigot's case, Cary, p. 29.

(*q*) Doe *v.* Sandham, 1 Term Rp. 705.

(*r*) Sandham *v.* Medwin, Excheq. 2 March 1789; in the Register's Calendar it stands, Hilary Term, 1789—10.

good

good in equity. But if a lease be made to a tenant at rack-rent without a fine, which is voluntary, yet if the tenant hath been at any considerable expense in building or improving, there the court will supply the defective execution, but otherwise not (*s*). Now from this it is clear, that the Master of the Rolls was of opinion that where the lessee was in *the nature of a purchaser*, he should be helped against a defective execution of a power. There appears to be no ground for aiding a defect in favour of a mere tenant at rack-rent, although holding under a lease, much less can the relief be afforded to a tenant from year to year holding under a parol, or even a written contract. The part performance of the agreement by taking possession, &c. is not material, as if an actual lease had been granted, a defect in it could not have been supplied. The lessee paying the full value for the estate, and that only during his occupation of it, cannot be put on the footing of a purchaser, who would sustain an actual loss if equity were not to interpose its aid. But where the lessee has expended money on the estate, he becomes a purchaser of the interest granted to him, and may well be held entitled to the aid of equity (*t*).

In the great case of Campbell *v.* Leach (*u*), the facts of which it is not easy to collect from the report, under a power to lease in possession, a new lease was granted to a person during the continuance of a former lease to him and another. The former lease was abandoned, but not surrendered: the new lease was agreed to be

(*s*) Anon. 2 Frem. 224.

(*t*) *Vide supra* p. 289, 290.

(*u*) Ambl. 740; App. No. 7, the material facts stated from Lib. Reg.

bad

bad at law, and it was doubtful whether the best rent was reserved: the bill was filed to supply the defect against the remainder-man; the lessee had been at great expense. The cause was heard before Lord Bathurst, assisted by Lord Chief Baron Smythe and Lord Chief Justice De Grey. The Lord Chief Baron said, the question arose upon the execution of a power, where courts of equity often interfere in behalf of creditors, purchasers, wife and children. The present was the case of a purchaser. The consideration moving from him was the money he had laid out. The objection was, that it was a lease in *reversion*, as there was a subsisting lease of the premises for some years then to come; but if such former lease was in fact given up at the time of this lease as was alleged, it would, he said, be an answer, so that if the lease was fair in its execution as to the *quantum* of the rent reserved, he thought a court of equity ought to carry it into execution. Lord Chief Justice De Grey was of the same opinion. He said, that the power was of a mixed nature, not like a power of jointuring, or power for raising money. But this was for the benefit of the tenant for life and the remainder-man. *If executing the power was for the benefit of the remainder-man, it should receive a liberal construction; but if tenant for life invades the interest of the remainder-man in order to benefit his own only, it should have another construction.* Lord Bathurst being of the same opinion, reversed a decree at the Rolls against the lessee, and directed an issue to try whether the rent reserved was the best that could be gotten.

Now it is from this case that the rule may be extracted, and it seems to be this: that where there is no fraud

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on the remainder-man, as where the former lease is abandoned, although not actually surrendered, or there is merely a defect in the mode of the execution of the power, as only one witness where two were required, or a seal be wanting, or the like; in all these cases it should seem that if the lessee *is in the nature of a purchaser*, equity will relieve against the defective execution of the power; but where the best rent is not reserved, or a fine is paid contrary to the terms of the power, or the lease substantially commences *in futuro*, or the interest of the remainder-man is, in other respects, invaded, as in the cases of Temple *v.* Baltinglass, and Sandham *v.* Medwin, before cited, there it seems clear that equity cannot relieve (*x*); nor in these cases can any line be well drawn as to the quantum of excess or defect in the execution of the power. Therefore a lease to commence the day after the date of the deed, would be equally bad with a lease to commence at fifty years from the date (1).

The principle that equity may aid a defective execution of a power to lease, derives great support from a case before Lord Chancellor Redesdale: a tenant for life, with a power of leasing, entered into a contract to grant a lease, and then died; and Lord Redesdale enforced the performance of the contract against the remainder-man. His Lordship very properly considered it as the case of a defective execution of a power, and he was of

(*x*) See Stratford *v.* Lord Aldborough, 1 Ridgw. P. C. 281.

(1) As to *excess* in the execution of powers of leasing, *vide infra*, ch. 9. sect. 8.

opinion

opinion that the power ought at least to be construed as liberally as a power of jointuring. He said that it was objected that a leasing power differs from all these cases of powers, and the difference is said to consist in this, that in the other cases the remainder-man has no interest in the mode in which the power is executed; that he claims nothing under it; but that under the leasing power he claims the rent reserved. Now, on what ground can it be contended that that which is a mere charge upon a remainder-man, is to receive a more liberal construction than what is not a mere charge upon him, but may be much for his benefit? In the case of powers to make leases at the best rent that can be obtained, it is evident that the author of the power looks to the benefit of the estate; and that the power is given for the benefit both of the tenant for life, and of all persons claiming after him; for where the tenant for life can give no permanent interest, and his tenant is liable every day to be turned out of possession by the accident of his death, it is hard to procure substantial tenants; and therefore it is beneficial to all parties that the tenant for life should have a power to grant such leases. It is evident that the occupying tenant can afford to give a better rent under such circumstances than if he were only to have a precarious tenure. This, therefore, is a power which is calculated for the benefit of the *estate*. Other powers, generally speaking, such as jointuring powers, and powers to make provisions for younger children, are calculated for the benefit of the *family*; they may be indirectly beneficial to the remainder-man, in some respects, but they are no direct benefit to him; nor can I conceive why these powers should be construed more liberally than powers

to

to make leases, except where it is evident that such power is abused (*x*.)

So in a case before Lord Kenyon, he said that a lease not being attested conformably to the power, could not be supported in a court of law; yet even then, if granted for a valuable consideration, and merely defective in point of form, a court of equity would interfere and direct a proper lease to be granted (*y*).

(*x*) Shannon *v*. Bradstreet, 1 Sch. and Lef. 52.

(*y*) Doe *v*. Weller, 7 Term Rep. 478; and *vide supra* p. 289; and see Willes, 176.

SECTION II.

OF EQUITABLE RELIEF WHERE THERE IS NO MERITORIOUS CONSIDERATION IN THE APPOINTEE.

We have hitherto confined ourselves to the consideration of the cases where there is a meritorious consideration in the appointee, but in some instances equity will relieve the appointee against the defective execution, although he is a mere stranger. This is generally on the ground of fraud. Thus, where the person interested in the non-execution of the power has the deed creating the power in his custody, and the donee of the power wishing to execute it, send for the deed, which the party refuses to deliver, and thereupon the donee do an act with an intent to execute the power, equity will uphold the execution although defective, by reason of the fraud in the person who was to have the benefit of the original settlement (*a*). So equity would extend the same relief to a case where a wife having a power of revocation over an estate vested in her husband, is desirous to exercise it, but the husband hinders any body from coming to her, or prevents the execution, or obstructs the ingrossing of the deed of revocation (*b*).

On the ground of fraud also it has been decided, that although a power be defectively executed, and the court cannot relieve the appointee; yet if the remainder-

(*a*) See 3 Cha. Ca. 67, 83, 84, 89, 93, 108, 122; Ward *v.* Booth, 3 Cha. Ca. 69, cited; and see Fort. 333.

(*b*) Piggot *v.* Penrice, Com. 250; Prec. Cha. 471.

man,

man, with notice of the defect, has lain by a considerable time, and suffered the appointee to expend money on the estate, and acquiesced in his title, equity will compel him to make good the defect (*c*).

But fraud being a thing odious and never to be intended or presumed, must be strictly proved (*d*). Therefore in a case where a wife having a power of revocation over an estate vested in her husband, sent instructions to a solicitor to prepare a deed of revocation, and the solicitor, who was a friend of the husband's, communicated the instructions to him, although he was desired to keep them secret, and delayed perfecting the deed so long, that the wife died before it was executed; the court censured the solicitor for his conduct, but denied relief to the intended appointee, because no fraud was proved in the husband himself (*e*). Under this head of fraud we may rank surprise, for to enable equity to relieve, the surprise must be such as is attended and accompanied with fraud and circumvention (*f*).

So it is said, that a court of equity may relieve in the cases of accident or disability. Thus in the Earl of Bath's case (*g*), where to the execution of the power, six witnesses were required, and three of them were to be peers; the Duke of Albemarle, the donee of the power, afterwards went over to Jamaica, and it was said by Mr. Baron Powell, that in case the Duke had taken the deed over with him to Jamaica, and there had had an

(*c*) Stiles *v.* Cowper, 3 Atk. 692; Shannon *v.* Bradstreet, 1 Rep. Temp. Redesdale, 52; and see Anon. Bunb. 53; Stratford *v.* Lord Aldborough, 1 Ridgw. P. C. 281.

(*d*) 3 Cha. Ca. 85, 114.

(*e*) Piggot *v.* Penrice, Com. 250; Prec. Cha. 471.

(*f*) 3 Cha. Ca. 114, 115.

(*g*) 3 Cha. Ca. 68.

intention

intention to revoke it, and had gone as far as he could to do it, had made his will, and had six witnesses to it, he believed it would be a good revocation in equity, though none of the witnesses were peers, because of the *disability* he would be under to have such witnesses (*h*). Lord Chief Justice Treby, and the Lord Keeper, appear to have entertained the same sentiments (*i*), and in a modern case, Lord Mansfield expressed himself of the same opinion (*k*). Lord Chief Justice Treby, in the Earl of Bath's case, said, that the accident or impossibility of complying with the circumstances, was another ground of relief in equity, when the donee hath a plain intention to do it; but then he must do all that he can, as the case of a man's being obliged to pay or tender money at such a place, and he falls sick or lame, or bedridden, that he cannot go thither, and it is tendered by another by his order, or at another place; this being an act of God, he thought it would be a good performance of the condition (*l*). And Lord Chief Justice Holt considered *accident* a good ground of relief (*m*), as where the party was prevented by sickness.

But upon none of these points has there been any decision, whereas there is a case in which a deed executed under a power, was held to be badly executed for want of a signature (which was required by the power), *although the donee could not write by reason of the gout in his hand* (*n*). And notwithstanding the authority of the great personages by whom the foregoing *dicta* were pronounced, it may be doubted whether equity ought to

(*h*) 3 Cha. Ca. 68.
(*i*) *Ib.* 90, 126.
(*k*) Cowp. 267; and see Piggot *v.* Penrice, Com. 256.
(*l*) 3 Cha. Ca, 89.
(*m*) *Ib.* 108, 109.
(*n*) See Blockvill *v.* Ascott, 2 Eq. Ca. Abr. 659, n. (*b.*)

relieve

relieve on the mere ground of accident or disability. How can it be ascertained that, in the cases assumed, the parties had not the sickness of the donee of the power, or his absence abroad, in their contemplation? These are circumstances of ordinary occurrence, from sickness few are exempt, and it might have been intended, that during the party's absence from his friends, or whilst his mind was enfeebled by illness, the power should not be executed.

II. The doctrine of election furnishes another principle in favour of the defective execution of a power, although there is no meritorious consideration in the appointee. The foundation of election is, that no one shall claim under, and in opposition to the same instrument; when a man claims under a deed, he must claim under the whole deed together; he cannot take one clause, and desire the court to shut their eyes against the rest. There is a tacit condition annexed to all provisions of this nature, that the person taking do not disturb the disposition which his benefactor has made (*o*). This principle applies even to interests of persons under disabilities, as infants and married women; nor is it material whether the interests are immediate, remote, contingent, of value, or not of value (*p*); and the rule applies as well to copyhold as to freehold estates (*q*). But we must be careful to distinguish

(*o*) Streatfield *v.* Streatfield, For. 176.

(*p*) 2 Ves. jun. 560, 696, 697; 3 Ves. jun. 385; Ardesoife *v.* Bennet, 2 Dick. 463.

(*q*) Rumbold *v.* Rumbold, Wilson *v.* Mount, 3 Ves. jun. 65, 191; Pettiward *v.* Prescot, 7 Ves. jun. 541.

cases of express conditions, which clearly are not cases of election.

It is well established that an heir shall be put to his election where the estate is devised to him, although by the rule of law the devise is inoperative, and he takes by descent; as if a man being seised of some lands in tail, and also of others in fee, devise the intailed lands to his youngest son, and the fee simple estate to his eldest, who is issue in tail; the devise to the eldest is void, and he takes by descent, yet nevertheless he shall be put to his election (*r*). In the discussion of Thellusson *v.* Woodford, Sir Samuel Romilly put it as a doubtful point, whether the heir must elect where a legacy is given to him, and an estate to a stranger, and after the will a recovery is suffered by the testator, whereby the will is revoked, and the estate descends to the heir, and he thought that the heir could not be put to his election; but Alexander, who was on the other side, thought it was a case of election, as was, he said, every case in which you can look at the will. The point, however, seems very doubtful, for notwithstanding that the testator intended the estate to go to the devisee, yet *the will being revoked as to the devise,* although by construction of law, there seems to be no equity attaching on the conscience of the heir. Independently of the question of election, equity could not relieve the devisee against the revocation of the will.

Where interests are given to a person, and to his chil-

(*r*) Noys *v.* Mordaunt, 2 Vern. 581; Anon. Gilb. Eq. Rep. 15; See Rich *v.* Cockell, 9 Ves. jun. 369; and see White *v.* White, 2 Dick. 522, Reg. Lib. B. 1775, fol. 650—655.

dren

dren after him, the claim of the parent in opposition to the will, will not bind the children, who may elect for themselves (*s*). In one case it seems to have been thought that an election could not be raised upon an estate settled with several limitations, on account of the confusion which would ensue: the devise would sometimes be good, at other times not, as the devisee in remainder submitted to the will or not (*t*), but this objection is not now attended to.

At one period it was holden, that where a person supposes he has lawful power to dispose of an interest, and this appears on the face of the will, it is not a case of election, as it could not be proved that he meant to dispose of the estate if he had known he had no power to dispose of it (*u*). This construction has, however, been very properly overruled (*x*), upon the ground of the danger of speculating upon what the testator would have done had he known the fact.

It follows from these principles, that where a man having a power to appoint to A, and the fund in default of appointment is given to B, exercise the power in favour of C, and give others benefit to B, although the execution is merely void (1), yet if B will accept the gifts

(*s*) Ward *v.* Baugh, 4 Ves. jun. 623; see Long *v.* Long, 5 Ves. jun. 445.

(*t*) Forrester *v.* Cotten, Amb. 388.

(*u*) Cull *v.* Showell, Ambl. 727; Wood. App.

(*x*) Whistler *v.* Webster, 2 Ves. jun. 367; and see Wright *v.* Rutter, 2 Ves. jun. 673; Rutter *v.* M'Lean, 4 Ves. jun. 531; and see Doe *v.* Lord George Cavendish, 4 Term. Rep. 741, note.

(1) This perhaps cannot properly be called a defective execution of the power, as C was not the object of the power, but it affects the remainder so as to put the party intitled to it to his election.

to him, he must convey the estate to C according to the appointment (*y*). So where a power is to appoint to two, and he appoints to one only, and gives a legacy to the other, that is a case of election (*z*). But where there is no other fund than that appointed, the doctrine of election, which depends upon compensation, cannot apply; as where under a power to appoint to children, the father appoints it improperly, any child may set it aside, although a specific part is appointed to him, for the doctrine of election can never be applied but where, if an election is made contrary to the instrument, the interest that would pass by it can be laid hold of to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away (*a*).

To raise a question of election, the intention to pass the particular estate must appear upon the face of the instrument; it cannot be compelled on any thing dehors (*b*). But still extrinsic evidence has been allowed to shew what the testator considered as *his* estate, and consequently to determine what passed under a general devise so as put a party to his election (*c*).

In all the foregoing cases we cannot fail to have ob-

(*y*) Whistler *v.* Webster, 2 Ves. jun. 367.

(*z*) Wollen *v.* Tanner, 5 Ves. jun. 218.

(*a*) Bristow *v.* Warde, 2 Ves. jun. 336.

(*b*) Stratton *v.* Best, 1 Ves. jun. 285; Finch *v.* Finch, *ib.* 535; see Judd *v.* Pratt, 13 Ves. jun. 168

(*c*) See Pultency *v.* Darlington, 1 Bro. C. C. 223; Pole *v.* Lord Somers, Druce *v.* Denison, 6 Ves. jun. 309, 385; and see Wright *v.* Rutter, 2 Ves. jun. 673; Rutter *v.* M'Lean, 4 Ves. jun. 631; but see Forrester *v.* Cotten, Ambl. 389.

served,

served, that the interest did not pass by the instrument, but still some nice distinctions have been taken as to the legal capacity of the devisor, and the validity of the instrument to pass the interest in case he had actually been entitled to it in his own right.

This doctrine was first discussed in a case of frequent reference (*d*). There an infant having personal estate, of which she had ability to dispose, and a power over a real estate, to which she was entitled in default of appointment, bequeathed the personalty to her only child, and appointed the estate to strangers. And Lord Hardwicke held the appointment to be void; and that this was not a case of election, as the will was void as to the real estate, because, as he observed in another case, (*e*) of her infancy, and he added, as it would if she had been a feme covert (*f*). *This was a disability in the person.*

Lord Hardwicke said, it was like the case where a man executed a will in the presence of two witnesses only, and devises his real estate from his heir at law, and the personal estate to the heir at law, this is a good will as to personal estate; yet for want of being executed according to the statute of frauds, is bad as to the real estate, and he said he should in that case be of opinion, that the devisee of the real estate could not compel the heir at law to make good the devise of the real estate before he could entitle himself to his personal legacy, because here was no will of real estate for want of proper forms and ceremonies required by the statute. This doc-

(*d*) Hearle *v.* Greenbank, 3 Atk. 695: 1 Ves. 298.

(*e*) 1 Ves. 14.

(*f*) See and consider Rich *v.* Cockell, 9 Ves. jun. 369.

trine has been recognized, and acted upon by Lord Alvanley (*g*), Lord Kenyon (*h*), and Lord Eldon (*i*); for although the will cannot be read without the devise in it, yet, as Lord Alvanley correctly expressed it, a judge can say, for the statute of frauds enables him, and he is bound to say, that if a man by a will unattested gives both real and personal estate, he never meant to give the real at all (*k*).

Lord Hardwicke, however, determined, that where an express condition is annexed to the personal legacy, the heir at law must make good the devise of the realty, or give up his legacy (*l*); and although this distinction has been constantly disapproved of, yet it has always been acted upon, and cannot now be disturbed (*m*) (1).

(*g*) *Ex parte* the Earl of Ilchester, 7 Ves. jun. 372.

(*h*) Carey *v.* Askew, 8 Ves. jun. 492, cited by Romilly; and in the argument of Thellusson and Woodford, *infra*, MS.

(*i*) Sheddon v. Goodrich, 8 Ves. jun. 481.

(*k*) Buckeridge *v.* Ingram, 2 Ves. jun. 666.

(*l*) Boughton *v.* Boughton, 2 Ves. 12.

(*m*) Carey *v.* Askew, Sheddon *v.* Goodrich, *ubi sup.*; and Thellusson *v.* Woodford, *infra*.

Apoint

(1) In Thellusson's case Lord Erskine said, the general case of election is good. As to the exceptions, an infant may bequeath his personalty, but not so as to his realty. An infant having real and personal, and having both capacity and power to bequeath the personalty, gives the personalty under the idea that he can dispose of his realty; now I conceive, with submission, that the infant's will may be read. If I had originally had to decide this point, I would have held it a case of election; so of a feme covert, I want to know why the husband should not be put to his election; I cannot see the common sense of that exception, but I am bound by authorities; so where a will is executed in the presence of two witnesses, why should it be read so as to give the heir the personalty? I would

A point lately arose in the great cause of Thellusson and Woodford (*n*), which again called this doctrine into question. Thellusson by his will duly executed to pass real estates, gave legacies to his heir at law, and directed that all contracts for the purchase of estates, which he should enter into before his death, should be completed by his trustees, who should stand seised thereof to the uses mentioned in his will. He did purchase estates, and did not republish his will. Some were actually conveyed to him, the contracts for others remained *in fieri*. The question was, whether the heir should be put to his election. The case was elaborately argued. The principal argument for the heir at law was, that there was no case in which the heir at law was put to his election as to estates which came to him as heir. This was strongly urged, and the case was distinguished from cases of express conditions; and it was neatly argued, that there were three requisites to a devise, 1st, age; 2d, possession; and 3d, three witnesses; and that any will in which any of these was wanting was void, and not a case of election. Well, here the second was wanting, and the question of election could not arise any

(*n*) See 4 Ves. jun. 235—237.

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would never have given him the legacy. How pure the laws of England would be were it not for these subtleties! But I dare not decide this case against the authority of Lord Hardwicke. MS. In Carey *v.* Askew, as stated by Sir Samuel Romilly, Lord Kenyon said, he should have found it difficult to distinguish the cases; but he felt himself bound by Lord Hardwicke's decision, although he thought Boughton *v.* Boughton wrong. It was settled that the heir could not be put to his election without an express condition, and you cannot *presume* a condition. Express conditions were not like this case. MS.

more than if the devisor had been an infant. On the other side it was insisted, that there being no disability in the person of the devisor, this was a case of election. Suppose a legacy to be given to a stranger, and a legacy to the heir, and a devise of the stranger's estate to a third person; that it was said was a case of election. Then suppose the testator to purchase the estate, how, it was asked, could that be said not to be a case of election. Lord Chancellor Erskine rightly determined that the heir should be put to his election(*o*).

A person is never put to his election till the funds are clearly ascertained, so that he may know exactly what he is to receive as a compensation for that which he gives up (*p*); and the party may file a bill to have the state of the fund ascertained (*q*). Where the state of the fund is free, and the party has acquiesced a long time, he will be held to have elected, although he has not expressly done so (*r*), but where the fund is embarrassed, a long acquiescence has been held not to bind the claimant (*s*), and *a fortiori* the mere receipt of gifts under the will for a short period will not have that effect (*t*); and where a widow released her dower, and elected to take under her husband's will, and the provision for her was afterwards claimed by creditors, she was allowed to resort to her dower, notwithstanding her election (*u*).

(*o*) Thellusson *v.* Woodford, Aug. 1806, MS.

(*p*) Wake *v.* Wake, 1 Ves. jun.; and see 2 Ves. jun. 370.

(*q*) Butricke *v.* Broadhurst, 1 Ves. jun. 171, 3 Bro. C. C. 88.

(*r*) Butricke *v.* Broadhurst, *ubi sup.* Ardesoife *v.* Bennet, 2 Dick. 463.

(*s*) Beaulieu *v.* Lord Cardigan, Ambl. 533, 6 Bro. P. C. 232; see 1 Ves. jun. 172, 336; Yate *v.* Mosely, 5 Ves. jun. 483, 484.

(*t*) Wake *v.* Wake, 1 Ves. jun. 335; Rumbold *v.* Rumbold, 3 Ves. jun. 65.

(*u*) Kidney *v*, Cousmaker, 12 Ves. jun. 136.

If

If the party has mortgaged the interest he takes in his own right, and then is suffered to elect to take under the will, the mortgage must be satisfied out of the interest provided for him by the will (*x*).

Where the claimant is an infant, or feme covert, it is usually referred to the master to see which is most for their benefit, to take under or against the will, but where the interest given by the will is manifestly a better interest, no reference will be made (*y*).

Where a person elects to take in opposition to the will, the interest given to him will be applied in compensation of the disappointed devisees (*z*). But the estate thus taken in opposition to the will, of course vests in the party with all the legal consequences attached to it. Thus where a tenant in tail devised away the estate, and gave the issue in tail, who was a married woman, and also her husband, other benefits by his will, she elected to take her estate tail in opposition to the will, but her husband of course took under the will, then his wife died, and he entered as tenant by the curtesy; and it was contended, that as he took under the will, he could not claim in opposition to it; but it was ruled, that his wife took the estate with all its legal incidents, and that consequently he was entitled to be tenant by the curtesy in right of *her* seisin, although he claimed under the will in his own right (*a*).

Closely allied to election, is the doctrine of satisfaction: where the interests of the objects of the power are

(*x*) Rumbold *v.* Rumbold, 3 Ves. jun. 65.

(*y*) Wilson *v.* Lord John Townshend, 2 Ves. jun. 693.

(*z*) Anon. Gilb. Eq. Rep. 15; Ward *v.* Baugh, 4 Ves. jun. 627.

(*a*) Lady Cavan *v.* Pulteney, 2 Ves. jun. 544; 3 Ves. jun. 384.

satisfied

satisfied by the donee of the power, their claim on the fund ceases (*b*). As this question, however, seldom arises upon powers, and as the doctrine of satisfaction is already discussed by other writers, I shall not stop to enquire what is in equity deemed a *satisfaction*. But it may be remarked, that as in cases of election, so in cases of satisfaction parol evidence is admissible, to shew that the testator considered the property subject to the power as part of his own property (*c*). And to create a case of satisfaction, a gift must move from the person himself. Therefore, if a man having a charge on his estate, and also a power over his wife's estate, both in favour of his child, appoint a sum to be paid to the child out of his wife's estate in satisfaction of the charge on his own, the declaration as to the satisfaction will be entirely void (*d*). Satisfaction can never be presumed where the intention of the donor is expressly stated, as where a man by his will appoints a portion under a power, and gives an annuity out of his own property to the same child, and then upon marriage gives the child a portion, which he declares to be in satisfaction of the annuity given by the will, no presumption of satisfaction can be raised as to the portion appointed under the power (*e*).

(*b*) Smith *v.* Lord Camelford, 2 Ves. jun. 698; Folkes *v.* Western, 9 Ves. Jun. 456, see *post*.

(*c*) Hinchliffe *v.* Hinchliffe, 3 Ves. jun. 516; and see Druce *v.* Denison, 6 Ves. jun. 309

(*d*) Roberts *v.* Dixall, 2 Eq. Ca. Abr. 668, pl. 19. See the case in ch. 9, s. 8, *infra*.

(*e*) Burges *v.* Mawbey, 10 Ves. jun. 319.

SECTION III.

OF NON-EXECUTION.

Some of the cases in the preceding section are in strictness, cases of non-execution, where the remainder-man is compelled to make good the disposition, on the ground of fraud or election; but putting aside these cases, although equity will, as we have seen, in favour of a purchaser, creditor, wife or child, supply the defective execution of a power, yet it is an immutable rule, that a non-execution shall never be aided (*a*). It is no ground for relief that the party intended to exercise his power, but was prevented by sudden death (*b*). We have seen that where a man has a general power of appointing a fund, and he exercise the power in favour of a volunteer, equity will in exclusion of the appointee, seize upon the fund as assets for the payment of the debts of the person executing the power, but if the party will not execute the power, the court cannot compel him to do so, nor can it affect the fund subject to the power, in favour of the creditors, for that would be against the nature of a power which is left to the free will and election of the party to execute it or not, for which reason equity will not say he shall execute it, or do that for him which he

(*a*) Arundell *v.* Philpot, 2 Vern. 69; Tomkyn *v.* Sandys, 2 P. Wms. 228, n. Wilm. 23; Bull *v* Vardy, 1 Ves. jun. 272.

(*b*) See Piggot *v.* Penrice, Com. 250; Gilb. Eq. Rep. 138.

does

does not think fit to do himself (*c*). This may seem rather a refined distinction, but it is well established (*d*).

But in laying down this broad rule, we must be careful to distinguish between mere powers, and powers in the nature of trusts. The distinction between a power and a trust, is marked and obvious. "Powers," as Lord C. J. Wilmot has said (*e*) "are never imperative: they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted." But sometimes trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; and if he refuse to execute it, or die without having executed it, equity on the general rule that the trust is the land (*f*), will carry the trust into execution, at the expense of the remainder-man, and without any regard to the person in whose favour it is to be executed, being a mere volunteer, and not a purchaser, creditor, wife or child. This is the case where a *power* is given by a will to trustees to sell an estate, and apply the money upon trusts. The power is in the nature of a trust. The legal estate, until the execution of the power, of course descends to the heir at law (*g*), and if the power be defeated at law, by the death of the person to

(*c*) Per Master of the Rolls, in Tollet *v.* Tollet, 2 P. Wms. 489.

(*d*) Holmes *v.* Coghill, 7 ves. Jun. 499, 12 Ves. jun. 206; Hixon *v.* Oliver, 13 Ves. 114.

(*e*) Wilm. 23.

(*f*) See Burgess *v.* Wheate, 1 Blackst. 162, per Lord Mansfield.

(*g*) Warneford *v.* Thompson, 3 Ves. jun. 513; Hilton *v.* Kenworthy, 3 East, 553; and see Co. Litt. 236 a.

whom

whom it was given, the legal estate would *remain* in the heir at law for his own benefit, but equity, by reason of the trust, will compel the heir to join in the sale of the estate for the purposes designated by the testator (*h*); and on the same principle, the same equity is extended to those cases, where although in words a power is given, yet it never arises by reason of the testator having omitted to appoint some person to execute it (*i*).

The question whether a power is simply such, or a power in the nature of a trust, frequently arises on a power to appoint to children (*k*). In Brown *v.* Higgs (*l*) Lord Eldon stated the principle of all the cases on this subject to be, that if the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee, for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts the principle as to trusts, and will not permit his negligence, accident or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute it.

In Harding *v.* Glyn (*m*), Harding devised certain arti-

(*h*) Garfoot *v.* Garfoot, 1 Cha. Ca. 35; Gwilliams *v.* Rowel, Hard. 204; Auby *v.* Doyl, 1 Cha. Ca. 180 cited, reported in 1 Cha. Rep. 89, nom. Amby *v.* Gower, and see Witchcot *v* Souch, 1 Cha. Rep. 97.

(*i*) Hyer *v.* Wordale, 2 Freem. 135, cited; Locton *v.* Locton, 2 Freem. 136; Pitt *v* Pelham 1 Cha. Ca. 176, 1 Cha. Rep. 149, 2 Freem. 134, 1 Lev. 304, which was against the trust, but reversed in Dom. Proc. and see Carvill *v.* Carvill, 2 Cha. Rep. 156.

(*k*) See Jones *v.* Clough, 2 Ves. 367, and see 5 Ves. jun. 856.

(*l*) 8 Ves. jun. 574.

(*m*) 1 Atk. 469; S. C. stated from the Register's book, 5 Ves. jun. 501; 8 Ves. jun. 571, from Mr. Joddrell's note.

cles

cles to his wife, "but did desire her, at or before her death, to give the same unto and amongst such *of his own relations* as she should think most deserving and approve of." The Master of the Rolls held this to be a trust for the relations, in default of appointment. He said that it operated as a trust in the wife, by way of power, of naming and apportioning, and her non-performance of the power should not make the devise void, but the power should devolve on the court.

So in (*n*) Brown *v.* Higgs, a leasehold estate was bequeathed to A; and after directing him to pay certain sums, the testator empowered him to employ the residue of the rent to such children of my nephew Samuel Brown, as the said A shall think most deserving, and that will make the best use of it;" and this was considered, in default of appointment, as a trust for all the children. This decree was affirmed by Lord Alvanley, M. R., on a rehearing (*o*) and also by Lord Eldon, upon an appeal (*p*).

But very nice distinctions are taken in these cases. Thus in the Duke of Marlborough *v.* Godolphin (*q*) A devised a legacy of 30,000*l.* to his wife for life, "and after her decease to be divided and distributed to, and amongst such of his children, and in such manner and proportion as she by any deed, &c. should direct and appoint, and for no other purpose whatever." Lord Hardwicke held it to be a mere power, and not a trust

(*n*) Brown *v.* Higgs, 4 Ves. jun. 708.

(*o*) 5 Ves. jun. 495.

(*p*) 8 Ves. jun. 561; and see Paul *v.* Compton, ibid 375; Cruwys *v.* Colman, 9 Ves. jun. 319; and see Madoc *v.* Jackson, 2 Bro. C. C. 588, and 4 Ves. jun. 792, n. (a); Davy *v.* Hooper, 2 Vern. 665; 1 Bro. P. C. 351

(*q*) Duke of Marlborough *v.* Godolphin, 2 Ves. 61; 5 Ves. jun. 506, stated from Reg. Lib. S. C. MS.

for

for the children, in default of appointment (*r*). He appears to have drawn a distinction between a bequest, "amongst my children, as A shall appoint," which he considered as a trust, and a bequest amongst *such* of his children," &c. which he held to be a mere power. He considered the power in the principal case, as given to secure her the respect of her children. In Brown *v.* Higgs, upon the appeal, Lord Eldon observed, that the Duke of Marlborough *v.* Lord Godolphin, was certainly very difficult to reconcile with Harding *v.* Glyn, or with the case before him. But the question was not, whether one case was to be reconciled with others, but, whether all the cases had gone upon a principle, which professed to save whole, Harding *v.* Glyn. Lord Hardwicke in the Duke of Marlborough *v.* Lord Godolphin, did not say, that, where there is a power, and it is made the duty of the party to execute it, and he would not execute it, in such a case this court would not act: but he collected from the scope and object of the disposition in that case, taken altogether, the opinion, that it was a case in which the person having a power to dispose of the sum of 30,000*l.* had a mere power, not clothed with any duty requiring her to execute it; and therefore as to what was not disposed of, the court could not interfere (*s*). In another passage his Lordship said, that the case of Harding *v* Glyn, could not be got rid of by saying it was a singular case, and that it was difficult to reconcile all subsequent cases with it; for that case had been treated as a clear authority, probably for the whole, certainly

(*r*) And see Bull *v.* Vardy, 1 Ves. jun. 270; Target *v* Gaunt 1 P. Wms. 432.

(*s*) 8 Ves. jun. 569, 570.

tainly by his own experience, for a very considerable part of the time elapsed since that judgment was pronounced.

In the before-mentioned case of Brown *v.* Higgs, one estate was devised, "to one of the sons of my nephew Samuel Brown, as he shall direct by a conveyance in his life-time, or by his will." This point did not call for a decision, but Lord Alvanley seemed to think it a mere power. Lord Eldon's opinion cannot be easily ascertained (*t*).

There is a class of cases where the bequest is considered not as a power in the nature of a trust, but as a power with a bequest over to the object of it in default of appointment, by *implication*. In many instances it is difficult to distinguish the cases.

Thus in Mason *v.* Limbery (*u*), a bequest to A for life, whom the testator "desired at his death to give it amongst his children, and the children of his said daughter, as he should think fit," was holden by Lord Talbot to be a devise to the children in default of appointment, and the children were accordingly decreed to be entitled to the fund, although A died in the life-time of the testator. And there are other cases to the same effect (*x*).

(*t*) 8 Ves. jun. 576.

(*u*) T. Term 1734, MS.

(*x*) Witts. *v.* Boddington, 3 Bro. C. C. 95 : 5 Ves. jun. 503, stated from Lib. Reg.; Reade *v.* Reade, 5 Ves. jun. 744; Longmore *v.* Broom, 7 Ves. jun. 124.

CHAPTER VII.

OF RELIEF AGAINST THE ACTUAL EXECUTION OF POWERS.

SECTION I.

OF VOID EXECUTIONS BY THE GENERAL RULE OF LAW.

In the last chapter we considered in what cases a *defective* execution of a power would be supported, and we are now to enquire in what instances the *actual* execution of a power may be set aside, although the solemnities required by the deed creating the power have been duly adhered to. This our present enquiry may be divided into two branches; 1. Where the instrument may be avoided at law. 2. Where equity only can relieve.

And first, an instrument executed under a power may be avoided at law on the same grounds as deeds in general may. To enter into the consideration of all the rules on this head would be an unpardonable digression, but their leading features, with reference to cases likely to arise upon the execution of powers, may, perhaps, without impropriety, be here stated. They form a link in the chain of our subject.

If then an instrument be altered by rasure or otherwise in a material part by the person for whose benefit

it was intended, the deed becomes absolutely void (*a*). The opinion formerly was, that a rasure by *a stranger*, would have the same operation (*b*); but it hath lately been very properly decided otherwise (*c*); for it should seem that the true ground of the rule is the fraud of the party interested. And since the statute of frauds (*d*), the mere cancellation of an instrument will not defeat the estate created by it (*e*).

If a power be executed as a consideration for stifling a prosecution for perjury, the execution is merely void: *non est factum* may be pleaded to the deed at law, and the special matter given in evidence (*f*), although the opinion formerly was, that equity only could relieve where the consideration did not appear on the face of the deed. So an execution of a power as an inducement to a woman to live with the party in a state of prostitution, is void (*g*), but where it is a compensation for the loss of virtue after cohabitation, or, as it is termed, *præmium pudicitiæ*, the consideration is good, and the deed cannot be avoided (*h*), unless the man was married at the time of the cohabitation, and the woman was aware of this fact (*i*), or unless, according as it should seem to Lord Hardwicke's opinion, the woman was previously

(*a*) Whelpdale's case, 5 Rep. 119, a.

(*b*) Pigot's case, 11 Rep. 27, a.

(*c*) Henfree *v.* Bromley, 6 East, 310.

(*d*) 29 Car. 2. c. 3, s. 3.

(*e*) M'Gennis *v.* M'Cullough, Gilb. Eq. Rep. 235; Roe *v.* Archp. of York, 6 East 86; and see Leech *v.* Leech, 2 Cha. Rep. 52, which was before the statute.

(*f*) Collins *v.* Blantern, 2 Wils. 347; and see Edgecombe *v.* Rodd, 5 East, 294.

(*g*) Walker *v.* Perkins, 3 Burr. 1568.

(*h*) Marchioness of Annandale *v.* Harris, 2 P. Wms. 432; Turner *v.* Vaughan, 2 Wils. 339; Hill *v.* Spencer, Ambl. 641.

(*i*) Priest *v.* Parrot, 2 Ves. 160; and see Lady Cox's case, 3 P. Wms. 340.

to

to the intimacy a prostitute (*k*); but in a later case, Lord Camden held clearly, that there was no principle even in equity, which says a man may not make a voluntary provision for a common prostitute, and he made a decision accordingly in a case, the circumstances of which were well calculated to put the rule to the test (*l*). So an execution in consideration of the appointee procuring a marriage between the donee of the power and another person is void (*m*); and in like manner, the deed may be avoided whenever the consideration for executing it is such as the policy of the common law rejects, or as the statute law forbids.

If the deed be executed under duress, it is voidable, but not actually void, consequently the party may avoid it by special pleading, but cannot plead *non est factum*, and give the special matter in evidence (*n*).

There are only two other cases which I shall here notice—drunkenness and lunacy. As to drunkenness, the distinction seems to be, that the instrument cannot be relieved against, unless the party was drawn into drink through the management or contrivance of him who gained the deed (*o*), in which case the deed is absolutely void, both at law and in equity, and consequently *non est factum* may be pleaded to it at law, and the drunkenness by the fraud of the plaintiff may be given in evidence (*p*).

(*k*) See Clarke *v.* Periam, 2 Atk. 333, 337.

(*l*) Hill *v.* Spencer, Ambl. 641.

(*m*) Stribblehill, *v.* Brett, Prec. Cha. 165, 2 Vern. 445; reversed in Dom. Proc.; see 1 Treat. Eq. book 1, ch. 4. s. 10; and Fonblq. notes, ibid.

(*n*) See Bull. N. P. 172.

(*o*) Johnson *v.* Medlicott, 3 P. Wms. 131, n.

(*p*) Cole *v.* Robbins, Bull. N. P. 172.

As to lunacy, although the deed may be set aside by the committee of the lunatic, or by his heirs after his death; yet it is incontrovertibly established, that the party himself cannot, after he has recovered his senses, plead his lunacy in avoidance of the deed (*q*). But a distinction has been established by the case of Yates *v.* Boen (*r*), which does not appear to have been attended to by writers on this subject, although they refer to the case. To debt upon articles, the defendant pleaded *non est factum*; and upon the trial, offered to give the lunacy in evidence. The Chief Justice thought it ought not to be admitted upon the rule in Beverley's case, that a man shall not stultify himself; but on the authority of Smith *v.* Carr, 5th July 1728, where Chief Baron Pengelly in the like case admitted it, and on considering the case of Thompson *v.* Leach, the Chief Justice permitted it to be given in evidence, and the plaintiff upon the evidence became nonsuit. Now the history of this revolution in this branch of law is this, when Beverley's case was decided, it was holden that deeds executed by lunatics were voidable only, but not actually void, and therefore they could only be set aside by special pleading, and by the rule of law the party could not stultify himself. And Mr. Justice Blackstone, following the old rule, has laid it down that deeds of lunatics are avoidable only, and not actually void (*s*). But n Thompson *v.* Leach, this distinction was solemnly established, that a feoffment with livery of seisin by a lunatic, because of the solemnity of the livery, was void-

(*q*) Beverley's case, 4 Rep. 123, b.; Stroud *v.* Marshall, Cro. Eliz. 298.

(*r*) Yates *v.* Boen, 2 Str. 1104.

(*s*) 2 Comm. 291.

able

able only, but that a bargain and sale, or surrender, &c. was actually void (*t*). This then was the ground of the decision in Yates *v.* Boen. When the Chief Justice remembered that an innocent conveyance or deed by a lunatic was merely void, he instantly said, that *non est factum* might be pleaded to it, and the special matter given in evidence; and this applies strictly to deeds executing powers. But in the case of a feoffment with livery of seisin, the rigorous rule of law still prevails, and the party cannot stultify himself.

(*t*) Comb. 468.

SECTION II.

OF VOID EXECUTIONS IN EQUITY ONLY.

But there are some cases which a court of law cannot reach. This happens where the power is duly executed according to the terms of it; but there is some bargain behind, or some ill motive, which renders the execution fraudulent, and will enable equity to relieve. It were difficult to draw the precise line between the jurisdiction of law and equity on this head. The substantial ground upon which equity maintains almost an exclusive jurisdiction in cases of fraud is, that it is enabled to mould and cut down the fraudulent instrument according to good conscience; whereas a court of law, if it take conuzance of the subject, must entirely defeat the instrument: it cannot maintain the execution, so far as it is within the meaning of the power, and set it aside so far only as it is a fraud on the authority; but where the execution is altogether a fraud on the power, it may be asked, why, if you can once attack a deed executed under a power on the ground of fraud, may not that fraud be established at law as well as in equity. For this the case of Collins *v.* Blantern (*a*) is a strong authority. It is not impossible that it may be established, that whatever is a totally *fraudulent* execution of a power may be taken advantage of in either court. It has never been decided that a court of law cannot enter into the consideration of the fraud; and until

(*a*) Collins *v.* Blantern, 2 Wils. 347.

Collins

Collins *v.* Blantern was decided, it was the general opinion, that a court of law would not advert to a consideration, unless it appeared on the face of the instrument. In the case of Butcher *v.* Butcher (*b*), a question arose, whether, under a power to appoint to children, equity could relieve against an appointment under which a share merely illusory was given to one child. The Master of the Rolls said, in terms the power, though limited as to objects, is discretionary as to shares. A court of law says, no object can be excluded: but there it stops. It does not attempt to correct any the extremest inequality in the distribution; and yet, if that is a fraudulent execution of the power, why is it not void at law? A fraudulent act has no more validity in a court of law than in a court of equity; and if it is not a fraudulent execution, upon what principle does a court of equity deny it effect? It is sometimes said, this court interferes for the purpose of carrying into effect the intention of the party creating the power; who must have meant, that each object should derive the same real benefit from the execution of the power. Now, every instrument must receive the same construction from every court. Whatever is its true meaning must be its meaning every where. If then the true meaning of the power, however discretionary in terms, be, that each object shall have what is called a substantial share, it is not executed according to its true meaning, and therefore is not well executed by an appointment that does not give to each object a substantial share. A court of equity may, in the exercise of its own particular jurisdiction, supply defects in the

(*b*) Butcher *v.* Butcher, 9 Ves. jun. 382; and see 1 Burr. 125.

execution of a power. But I cannot understand how the question, whether a power is well or ill executed, can receive different determinations in different courts. If it is not executed according to its true import, how can a court of law say, it is well executed; and if it is executed according to its true import, how can a court of equity say it is ill executed?

Upon questions like that in the last case, the jurisdiction exercised by equity is infinitely more strong than the common relief in case of fraud. If a man, having a power to appoint to A or B, appoint to A, in consideration of a sum paid by him, equity will relieve against the fraud, and the courts of law might perhaps refuse to interfere, on the ground that they have not the same means of inforcing the discovery of fraud, and of relieving against it. But where, as in Butcher *v.* Butcher, a man has a power over a fund, which it is admitted will at law enable him to give any share, however trifling, to one party, and he *without fraud* exercise that power accordingly, equity, by interposing its authority, actually puts a different construction on the instrument to what it must receive in a court of law; and yet, if a power give a clear right to appoint to several persons, or to any of them exclusively of the others, equity can grant no relief against the *bona fide* exercise of it in favour of some of the objects, excluding the others. But however strange this doctrine may seem, it is well established that where the power does not authorise an exclusive appointment, equity will relieve against any appointment of an illusory share, although this relief is now very confined (*c*).

(*c*) *Vide infra*, ch. 9. s. 4.

I now

I now proceed to state the cases of fraud in which equity has relieved: If a person, having a power of jointuring, execute it in favour of his wife, but it is agreed between the parties that the wife shall receive part only of the jointure for her own benefit, and that the residue shall be applied for the husband's benefit, equity will set aside the execution of the power, so far as it is in favour of the husband himself, on the ground of its being a fraud on the power and those creating it (1). And no confirmation by the wife after the death of the husband will avail, as the ground of relief is the fraud on the remainder-man (*d*).

So if there is a power to make a jointure under restrictions, as 100*l.* a-year for every 1000*l.* and the husband himself advance a sum of money in order colourably to enable him to make the larger jointure, the court will reject such part as is more than proportional

(*d*) Lane *v.* Page, Ambl. 233. Note, this was a case of rank fraud; see Appen. No. 8; the facts stated from Reg. Lib. Aleyn *v.* Belchier, Reg. Lib. A. 1757, fol. 432, (B); App. No. 9.

(1) The late Mr. Justice Ashurst, when at the bar, said, *arguendo*, "Fraud, particularly in the case of powers, is cognizable in a court of law; Lane *v.* Page, T. 27. Geo. 2. B. R. A power given for one purpose shall not be exercised for another, though within the letter of the power," 1 Blackst. 619. If the court of King's Bench held the execution bad in Lane *v.* Page, that case would be an important authority with reference to the doctrine discussed at the opening of this section. No notice is taken in Reg. Lib. of any proceedings having been had at law; and from the circumstance of the plaintiff at law having been also plaintiff in equity, it would seem that he did not prevail at law. I shall make a point of searching for the case at law before the work is printed off. See Appendix, No. 8.

to

to the real fortune (*e*). But in these cases equity will not set aside the whole settlement, but merely that part which is infected with fraud (*f*).

Again, where a father, having an exclusive power of appointing to children, with the consent of a trustee, prevailed on the trustee to join in appointing the estate to the youngest son, by representing the eldest as undutiful and extravagant, upon a bill by the eldest son to set aside the appointment, it was decreed accordingly, upon proof of the plaintiff being dutiful and not extravagant, and that the father had misrepresented him; and although the trustee's evidence was admitted, yet Lord Hardwicke refused to admit the father's evidence to prove the plaintiff's undutifulness and extravagance. The power was treated as a trust to be executed with discretion, and the father being charged with a breach of trust, could not be allowed himself to prove the undutifulness and extravagancy of his son, upon which the cause depended (g) (1).

So if a parent, having a power to appoint the estate unto any of his children, exclusively of the others, ap-

(*e*) See Ambl. 235, 239.

(*f*) Lane *v.* Page, Aleyn *v.* Belchier, *ubi sup.*

(*g*) Scroggs *v.* Scroggs, Ambl. 272. App. No. 10; the facts stated from Reg. Lib.

(1) In this case, the reporter says, that Sir Geo. Downing *v.* Bagnal, 6th and 7th July 1753, was cited for the plaintiff. The case, however, does not relate to the question, and must have been cited merely to shew the effect of concealment. The case is in Reg. Lib. A. 1755 fol. 95. The facts in the register's book led me to discover that the case is reported by Ambler himself, by the name of Downing *v.* Townsend, 280, 592.

point

point to one, upon a bargain made beforehand with that child, that he shall pay a consideration for it, equity will relieve against the appointment (*h*); and the same relief would be administered even against a purchaser, if he had notice of the fraud. This is a point which daily arises in practice. The parent first sells the estate, and then executes an appointment to one child, in order to enable him to make a title; and in many instances purchasers are justly alarmed, lest, if there should be any underhand agreement, the transaction itself would be deemed notice of the fraud. But where the money is paid to the father and son, and there is nothing to shew that the son was not to receive his due proportion of it, the purchaser may safely complete his contract, unless he has notice of some underhand agreement. This was decided in the late case of M'Queen *v.* Farquhar (*i*), where, under an exclusive power of appointment, a father appointed to one son in fee, and then the father and his wife and the son joined in conveying to a purchaser, and the money was expressed to be paid to them all. The title was objected to on the ground of an opinion, by which it appeared, that the father first sold the estate, and then the appointment was devised to make a title, and the purchase deed recited, that the contract was made with the father and son. It was insisted, that if the father derived any benefit from the agreement, or even made a previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution. But Lord

(*h*) See 1 vol. Ca. and Opin. 34; and see 1 Ves. jun. 310.

(*i*) M'Queen *v.* Farquhar, 11 Ves. jun. 467.

Eldon

Eldon over-ruled the objection, as it did not appear that the estate sold for less than its value, or that the son got less than the value of his reversionary interest, but merely that he as the owner of the reversion acceded to the purchase.

So where a party, taking under a power, has notice of an agreement for valuable consideration not to execute the power, or of what is tantamount to such an agreement, equity will relieve against the execution. Thus in the case of Scrope *v.* Offley (*j*) (1), a tenant for life, with a power of jointuring, conveyed the estate on his marriage as if he was seised in fee, and covenanted against incumbrances done or *to be done.* He afterwards married a second wife, and after marriage limited a jointure to her by virtue of his power, *she having notice of the first settlement,* and Lord Chancellor King relieved against the execution of the power, at the suit of the issue of the first marriage, and his decree was affirmed in the House of Lords.

But the most remarkable instance of the interference of equity remains to be stated. The precedent was established by Lord Keeper Wright, in the case of Chadwick *v.* Doleman (*k*). A power was given to a parent, tenant for life, to appoint a sum of money for younger childrens portions, to be raised after his death, which in default of appointment was to be equally di-

(*j*) 4 Bro. P. C. 237; see 2 Atk. 567 ; 2 Burr. 1145.
(*k*) 2 Vern. 528.

(1) In Barnard. Rep. Cha. 112, it is said, that the covenant in this case was construed to be a release. But however this may be, the principle in the text is clear.

vided

vided amongst them, and the estate itself was settled on the *first* and other sons in tail. There being several younger children of age, the father appointed the money amongst them, and gave a particular sum to his *second* son, who was of age and under a treaty of marriage. This son afterwards became eldest son, and as such intitled to the estate itself, and thereupon the father made a new appointment of the portion given to him. The Lord Keeper admitted, that the second son, at the time of the appointment, was a person capable to take, and was a younger child within the power of appointing; but was of opinion that this was a defeasible appointment (as he was pleased to term (1) it), not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was a person capable to take, at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition, that he should not afterwards happen to become the eldest son and heir; so that he had, as it were, only a defeasible capacity in him, and he decreed accordingly. He added, that although the appointment had been made in consideration of marriage, it would have been the same thing.

Lord Talbot appears to have approved of the foregoing decision (*l*); and in a case before Lord Hardwicke (*m*), he entirely adopted it. He said that Lord Cowper [*qu.* Wright] went plainly on this; he (Ld. Cowper) found

(*l*) See Jermyn *v.* Fellows, For. 93. (*m*) Teynham *v.* Webb, 2 Ves 198.

(1) This is the expression of Vernon the Reporter, from which it should seem that he did not approve of the decision.

it

it established by the precedents and authorities of this court, that the words younger children had received a prodigious latitude of construction to answer the occasions of families and intent of the parties, often construing an eldest daughter to be a younger child, that is, carrying the words very much out of the natural into a foreign and remote sense, to answer the intent: and he found it determined, that an only daughter, though not younger in comparison with another, should be considered as a younger child, where a provision was made for the younger children, and no other provision, and the estate limited to go over; and there have been cases, where a younger son becoming an eldest, under certain circumstances, has been considered as an eldest, to exclude him from the benefit of the portion; and therefore the rule laid down by Lord Harcourt in Beal *v.* Beal (*n*) has been, that younger children shall be considered such, as do not take the estate, are not the head and representative of the family: Lord Cowper having found this, from thence inferred a tacit condition, that the capacity of being a younger son should continue until the time of payment came, and therefore made that determination, though the father had actually executed his power. Taking it *in abstracto*, merely as an execution of a power, it could not possibly be maintained upon the general rules; but the ground Lord Cowper went on was, that the continuing of the capacity to the time of the provision taking effect in point of payment, was a tacit or implied condition going along with the appointment.

(*n*) 1 P. Wms. 451.

CHAP.

CHAPTER VIII.

OF RELIEF AGAINST POWERS.

SECTION I.

OF THE RELIEF AFFORDED BY THE 27 ELIZ. C. 4. AGAINST POWERS OF REVOCATION.

We have seen in how many instances the *execution* of powers will be relieved against; we are now to proceed a step further, and to enquire in what cases powers themselves will be set aside. I do not here speak of a power void in its very creation, as where the object of it is a perpetuity, or of a power not well created, but of powers well created, and which may in the first instance be legally executed; and this relief is given by the statute of 27 Eliz. c. 4, whereby it is enacted, that if any person or persons shall make any conveyance, gift, grant, demise, limitation of use or uses, or assurance of, in, or out of, any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination, or alteration, at his or their will or pleasure of such conveyance, assurance, grants, limitations of uses, or estates of, in or out of the said lands, tenements, or hereditaments, or of, in, or out of any part or parcel of them, contained or mentioned in any writing, deed, or indenture,

indenture, of such assurance, conveyance, grant or gift; and after such conveyance, grant, gift, demise, charge, limitation of uses or assurance so made or had, shall demise, grant, convey, or charge the same lands, tenements or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration, paid or given (the said first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them, in and by the said *secret* conveyance, assurance, gift, or grant), that then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, or hereditaments, so after bargained, sold, conveyed, demised, or charged, against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons, which have, shall or may lawfully claim any thing by, from, or under them, or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect, by virtue and force of the act. Provided nevertheless that no lawful mortgage to be made *bona fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of the act, but shall stand in the like force and effect as the same would have done if the act had never been made.

To understand the operation of this statute, we must consider, 1st, what instruments are avoided by it; and 2dly, in favour of whom. And first it is to be observed, that the statute does not extend to particular powers as a power to charge 2000*l.* on an estate of considerable value,

value, for such a power is not a power within the words of the statute (being for a particular sum), to revoke, determine, or alter the estate (*a*).

But it is of course quite clear, that a settlement by which a power of revocation, or a power tantamount to it, is reserved to the grantor, is void against a subsequent purchaser (*b*), and no artifice of the parties can protect the settlement. Therefore, although the power be conditional, that the settlor shall only revoke on payment of a trifling sum to a third person (*c*), or with the consent of any third person, who is merely appointed by the grantor (*d*); in these and the like cases the condition will be deemed colourable, and the settlement will be void against a subsequent purchaser.

But where a settlement is made, with a power to the settlor to revoke, so as that the money be paid to trustees to be invested in the purchase of other estates (*e*), or to revoke with the consent of a stranger *bona fide* appointed by the parties, and his consent is made requisite, not as a mere colour, but for the benefit of all parties, the settlement will be valid, and cannot be impeached by a subsequent purchaser (*f*). This was determined in the case of Buller *v.* Waterhouse (*g*), which, however, Mr. Powell thought did not settle the point, because all the claim-

(*a*) Jenkins *v.* Keymis, 1 Lev. 150.
(*b*) Cross *v.* Faustenditch, Cro. Jac. 180; Tarback *v.* Marbury, 2 Vern. 510; see Lane, 22.
(*c*) Griffin *v.* Stanhope, Cro. Jac. 454.
(*d*) See 3 Rep. 82, b.; Lavender *v.* Blackston, 3 Keb. 526.
(*e*) Doe *v.* Martin, 4 Term Rep. 39.
(*f*) See Leigh *v.* Winter, 1 Jo. 411; and see Lane, 22.
(*g*) 2 Jo. 94, 3 Keb. 751; and see acc. Hungerford *v.* Earle, 2 Freem. 120.

ants under the conveyance were purchasers for a valuable consideration (*h*). But it seems quite immaterial whether the settlement is merely voluntary, or upon valuable consideration (*i*). The statute says, that all conveyances which the grantor has power to revoke, shall be void against subsequent purchasers; and therefore, if parties giving a valuable consideration for a settlement, choose to permit the grantor to reserve a power to revoke the settlement, they must suffer for their folly. The grantor, by virtue of the power, may revoke the settlement; and if he sell the estate without revoking it, the statute makes it void. In fact, if we hold that settlements upon valuable consideration are not within this provision, we must at the same time admit, that the legislature did not intend to affect voluntary settlements, unless they were actually fraudulent: for voluntary settlements are void against purchasers under the second section of the act (1). This clause, therefore, would, under the construction put upon it by Mr. Powell, have scarcely any operation.

If a man having a power at a future day to revoke a settlement made by him, sell the estate before the day arrive, the settlement will be void against the purchaser, at the time when the vendor, according to the terms of the power, might have revoked the settlement (*k*).

(*h*) Pow. on Powers, 330.
(*i*) See acc. Rob. on Vol. Conv. 637.
(*k*) Mo. 618; 3 Rep. 82; b. Bridg. 23.

(1) The case of Doe *v.* Manning, mentioned in a note to the Treat. of Purch. p. 433, has since the publication of that work been decided in favour of the mortgagee against the persons claiming under the voluntary settlement.

And

And a settlement made with power of revocation, will be void against a subsequent purchaser, although the grantor release or extinguish the power previously to the sale, otherwise the vendor might secretly release or destroy the power, and then shew to the purchaser the conveyance containing the power of revocation, and so induce him to buy the land (*l*). In the case, however, in which this was decided, the settlement appears to have been voluntary, and the purchaser had not notice of the power being destroyed. But if a settlement should be made for valuable consideration, with a power of revocation, and the vendor should afterwards release the power for a valuable consideration, it is conceived that a purchaser, subsequently to the destruction of the power, could not prevail over the settlement, more especially if he had notice of the power being released.

The statute, as we have seen, operates conditionally, that is, where the first conveyance is not revoked according to the power. The act has no effect until the donee of the power sell the estate, without revoking the first conveyance, by virtue of his power. Suppose then a vendee professes to execute his power, but it is informally exercised, will the defect be cured by the statute? The legislature intended to protect purchasers against fraudulent settlements, with powers of revocation; for it is essential to bring a case within the act, that the estate should be sold, and the first conveyance not be revoked according to the power reserved to the grantor by such *secret* conveyance. The non-execution of the power is the fraud which the statute intended to avoid. The conveyances against which the act was intended to

(*l*) Bullock *v* Thorne, Mo. 615.

operate, were presumed to be *secret*. It was not meant to relieve any man who was aware of the existence of the power, and might have required it to be exercised. The statute was not intended to operate as a mode of conveyance. But without insisting that where a purchaser is aware of the settlement, he must require the power to be executed, it may be urged, that where a purchaser does rest his title on the execution of the power, he rejects the aid of the legislature, and takes his title under, and not in opposition to the settlement; and can, therefore, only stand in the same situation as any other purchaser who has unfortunately taken an estate under a power defectively executed. The purchaser can scarcely be held to have a good legal title, unless the vendor not only attempted to execute the power, but actually conveyed the estate to him.

SECTION II.

OF THE PERSON WHO MAY CLAIM THE RELIEF.

In Upton and Bassett's case (*a*) it was resolved, that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who is a purchaser for money or other valuable consideration; for although in the preamble it is said (for money or other good consideration), and likewise in the body of the act, relating to voluntary conveyances (for money or other good consideration); yet these words (good consideration) are to be intended only of valuable consideration; and that appears by the clause now under consideration, for there it is said, "for money or other good consideration paid or given;" and this word "paid" is to be referred to *money*, and "*given*" is to be referred to *good consideration*, so the sense is *for money paid or other good consideration given*; which words exclude all consideration of nature or blood or the like, and are to be intended only of valuable considerations which may be given, and therefore he who makes a purchase of land for a valuable consideration, is only a purchaser within this statute.

And to take advantage of this statute, the purchaser must have purchased *bona fide* without deceit or cunning, and for a valuable and not inadequate consideration (*b*).

(*a*) 3 Rep. 83, a; Cro. Eliz. 444.

(*b*) Upton *v.* Bassett, Cro. Eliz. 444; Nedham *v.* Beaumont, 3 Rep. 83 b; 2 And. 233; Doe *v.* Routledge, Cowp. 705; see Bullock *v.* Sadlier, Ambl. 764.

And a lessee with (*c*) or without a fine (*d*) as well as a mortgagee (*e*) is a purchaser within the statute.

So a settlement made on a wife or children, *prior* to marriage, is a conveyance for valuable consideration, by reason of the marriage itself (*f*). And the marriage consideration runs through the whole settlement, so far as it relates to the husband, and wife, and issue (*g*). But there are few cases, perhaps none, in which the marriage consideration will extend to remainders to collateral relations.

So, if an agreement be entered into before the marriage, for a settlement of the estate (*h*), or the husband receive an additional portion with his wife (*i*), the settlement, although made after marriage, will be deemed valuable. So, even an agreement to pay the husband a sum of money, as a portion, will support a settlement made after marriage, if the money is paid according to the agreement (*k*).

So the concurrence of the wife in destroying an existing settlement on her for the benefit of the husband, is a sufficient consideration for a new settlement, although

(*c*) Cross *v.* Faustenditch, Cro. Jac. 180.

(*d*) Hinde *v.* Collins, Cro. Jac. 181, cited.

(*e*) Goodright *v.* Moses, 2 Blackst. 1019; Chapman *v.* Emery, Cowp. 279.

(*f*) Colvile *v.* Parker, Cro. Jac. 158; Douglas *v.* Waad, 1 Cha. Ca. 99; Brown *v.* Jones, 1 Atk. 188.

(*g*) Nairn *v.* Prowse, 6 Ves. jun. 752.

(*h*) Griffin *v.* Stanhope, Cro. Jac. 454; Sir Ralph Bovie's case, 1 Vern. 193; but qu. where the agreement before the marriage is by parol; see Randall *v.* Morgan, 12 Ves. jun. 74.

(*i*) Colvile *v.* Parker, Cro. Jac. 158; Jones *v.* Marsh, For. 64; Stileman *v.* Ashdown, 2 Atk. 477; Ramsden *v.* Hylton, 2 Ves. 304.

(*k*) Brown *v.* Jones, 1 Atk. 188.

much

much more valuable than the former (*k*). And the better opinion, as well upon principle as in point of authority, seems to be, that the wife joining in barring her dower, for the benefit of her husband, will be a sufficient consideration for a settlement on her (*l*). It has been decided, that the wife parting with her jointure is a sufficient consideration. Now, if that which comes in lieu of dower is a valuable consideration, surely the dower itself must be equally valuable. Besides, where a woman is entitled to dower, the estate cannot be sold to advantage without her concurrence: she is a necessary party to any arrangement respecting the estate, and that alone seems a sufficient ground to support a settlement on her (*m*).

But if an unreasonable settlement be made upon a wife in consideration of her releasing her dower, it seems that equity in favour of subsequent purchasers will restrain her to her dower (*n*).

If upon a separation the husband settle an estate upon his wife, and a friend of her's covenant to indemnify the husband against any debts she may contract, this will be a sufficient consideration to uphold the settlement as valuable (*o*). Indeed, the courts will anxiously endeavour to support a fair settlement, and nearly any consideration will be sufficient for that purpose.

(*k*) Scott *v.* Bell, 2 Lev. 70; Ball *v.* Bumford, Prec. Cha. 113; 1 Eq. Ca. Abr. 354, pl. 5; see Clerk *v.* Nettleship, 2 Lev, 148.

(*l*) Lavender *v.* Blackstone, 2 Lev. 146; see and consider Evelyn *v.* Templar, 2 Bro. C. C. 148.

(*m*) Vide Roe *v.* Mitton, cited *infra*.

(*n*) Dolin *v.* Coltman, 1 Vern. 294.

(*o*) Stephens *v.* Olive, 2 Bro. C. C. 90; King *v.* Brewer, ib. 93. n.; see, however, Lord Eldon's argument in Lord St. John *v.* Lady St. John, 11 Ves. jun. 526.

Therefore, if a person, whose concurrence the parties think essential, join in a settlement, his concurrence will be deemed a valuable consideration, although he do not substantially part with any thing (*p*).

It follows therefore, that a conveyance, lease, or mortgage, to a purchaser, lessee, or mortgagee, or to a wife or child, under the circumstances before mentioned, by a person having settled his estate, with a power of revocation, is valid, although the power of revocation is not executed, for the settlement is defeated by the force of the statute of Elizabeth. But any conveyance executed by a husband in favour of his wife or children *after* marriage, which rests wholly on the moral duty of a husband and parent to provide for his wife and issue, is voluntary (*q*), and consequently the prior settlement would not be void as against such a conveyance.

And the purchaser must have contracted for the interest, or an estate or right out of the interest (*r*), to which the vendor would be entitled, in case the first deed were void. Thus, in a case mentioned by Sir Edward Coke in his Commentary on Littleton (*s*), A had a lease of certain lands for 60 years, if he had lived so long, and forged a lease for 90 years absolutely, and he, by indenture reciting the forged lease, for valuable consideration bargained and sold the forged lease, and

(*p*) Roe *v.* Mitton, 2 Wils. 356; see Myddleton *v.* Lord Kenyon, 2 Ves. jun. 391.

(*q*) Woodie's case, cited in Colvile *v.* Parker, Cro. Jac. 158; Goodright *v.* Moses, 2 Blackst. 1019; Chapman *v.* Emery, Cowp. 278; Evelyn *v.* Templar, 2 Bro. C. C. 148; see Parker *v.* Serjeant, Finch, 146.

(*r*) See Hatton *v.* Jones, Bul. N. P. 90.

(*s*) Co. Litt. 3, b.

all

all his interest in the land to B. Sir Edward Coke adds, that it seemed to him that B was no purchaser within the statute of 27 Elizabeth, for he contracted not for the true and lawful interest, for that was not known to him, for then perhaps he would not have dealt for it; and the visible and known term was forged; and although by general words the true interest passed, notwithstanding he gave no valuable consideration nor contracted for it; and of this opinion were all the Judges in Serjeants Inn. This was the case of a voluntary conveyance without a power of revocation, but the same principle would apply to a conveyance of a forged interest with such a power. Perhaps the ground of this decision was, that the purchaser did not require the aid of the statute, as the real interest was vested in him under the general words, and the voluntary settlement was void, independently of the statute, because it was forged.

CHAPTER IX.

OF THE ESTATES WHICH MAY BE CREATED UNDER POWERS OF APPOINTMENT, AND OF LIMITATIONS IN DEFAULT OF APPOINTMENT.

In treating of this important branch of our subject, I propose to consider, 1. What estates may be created in point of perpetuity. 2. The construction of powers in general. 3. Where an exclusive appointment is authorised. 4. What is deemed an illusory appointment, 5. The construction of a power to appoint to children. 6. The like enquiry upon a power to appoint to relations. 7. The rules established respecting powers to jointure. 8. The effect of an excess in the execution of a power. And lastly, How estates go in default of appointment, or where there is a bad appointment.

SECTION I.

WHAT ESTATES MAY BE CREATED IN POINT OF PERPETUITY.

1. Before we enter into the consideration of the estates which may be created under *powers* in point of perpetuity, it will be necessary to ascertain what estates the law will not permit to be created under an original instrument by reason of their tendency to a perpetuity.

Mr.

Mr. Justice Buller, in delivering judgment in Robinson *v.* Hardcastle (*a*), stated it as settled, that nothing less than an estate of inheritance could be limited under a power to a person unborn at the time of the execution of the deed creating the power, *because every execution of a power must be coupled with the power itself, and a life estate to a person not* in esse, *could not have been limited in the deed creating the power.* The learned Judge cited several cases to prove this position, which do not bear him out, and particularly an opinion of Wilmot's (*b*) on this point, who said that he had known a case where there had been an only child, and that child had, under a power to appoint to children, been made tenant for life, with remainder in tail to its issue; but he much doubted whether it could be legally done: manifestly, Mr. Justice Buller added, pointing out, that if a child to whom an estate is limited under a power is not born at the time the power is created, he can only take an estate of inheritance.

I cite this passage to rescue my Lord Chief Justice Wilmot from the imputation of having laid down any such doctrine. That very learned Judge's doubt was, not whether a person not in esse could be made tenant for life, but whether under a power to appoint to *children*, grand-children were proper objects. His doubt arose on the estate limited to the issue of the children, and not upon the life estate limited to the child himself. His opinion on this point is contained in a case upon a will which occurred while he was a judge of B. R.: "I dare say," he observed, "the variation in the wording of the will arose from a notion in the drawer,

(*a*) 2 Term Rep. 241. (*b*) See 2 Wils. 337.

that

that you cannot make an after-born son tenant for life. I have known such a notion prevail in the country, *though nothing is more untrue* (*c*)." And it is incontrovertibly settled, that an unborn son may be made tenant for life, and that a vested remainder may be limited thereon to a person in esse (*d*) ; but it is equally clear, that the estate cannot be limited to the children of the unborn tenant for life as purchasers. Upon this point Mr. Booth and Mr. Yorke were clearly agreed in Mr. Baker's case. They considered it as a possibility upon a possibility, which the law would not endure (*e*). Mr. Fearne was of the same opinion (*f*), and in Hay *v.* the Earl of Coventry (*g*), Lord Kenyon said it was clearly settled, that an estate for life may be limited to unborn issue, provided the devisor does not go further, and give an estate *in succession* to the children of such unborn son, by which expression it is clear, that he meant that the children could not take as purchasers. This is proved by an observation which he made in another case; he said, that "an unborn child may be made tenant in tail, but not tenant for life, *with a limitation to his children as purchasers* (*h*) ;" and it is distinctly laid down in the reasons for the respondent in the Duke of Marlborough's case, that if after the first vested estate of freehold you limit a contingent estate, or use for life to a person unborn, and then follow it with contingent remainders in tail to the sons or children of such unborn tenant for life, such contingent limitations of the inheritance would

(*c*) Evans *v.* Astley, 2 Blackst. 523.
(*d*) Routledge *v.* Dorrel, 2 Ves. jun. 357.
(*e*) See 2 vol. Ca. and opin. 435, 440.
(*f*) Posth. 215.
(*g*) 3 Term Rep. 86.
(*h*) 1 East. 452.

be

be void (*i*); and we learn from Lord Kenyon, that this doctrine was afterwards recognised by the learned Chief, who delivered the opinion of the judges on the case in the House of Lords (*k*). Indeed a limitation like this is clearly void by reason of its tendency to a perpetuity, independently of the technical objection of its being a possibility upon a possibility, which probably means the same thing. For, in the first place, a life not in being at the creation of the limitation, and a few months for gestation are taken, as the unborn tenant for life may be in *ventre matris* at his father's decease. Then twenty-one years and a few months more for gestation may be required, as the tenant for life may in like manner die, leaving a child *in ventre sa mere*, so that a century may easily elapse before the intail can be barred. Now, in the common case of a limitation to one for life, remainder to his first and other sons in tail, the estate is not *by force of the limitation*, tied up for more than a life *in being*, and twenty-one years and a few months, allowing for the gestation and infancy of the tenant in tail, although in this as well as in every other limitation, the estate may, by successive deaths and infancies, be tied up for a vast number of years; but that, as Mr. Justice Buller has correctly observed, is, by operation of law, and the limitation cannot be affected by legal consequences (*l*). And it may be remarked by the way, that it is perhaps far from clear that the law will, even in the case of an executory devise, permit the twenty-one years and a few months to be taken independently of the birth and infancy of the devisee (*m*).

(*i*) 5 Bro. P. C. 608.

(*k*) See 1 East, 453.

(*l*) See 4 Ves. jun. p. 328; but see 12 Ves. jun. p. 232.

(*m*) See Treat. Purch. 2d edit. p. 556, n. where the authorities are collected.

But

But as a child in *ventre sa mere* is considered as a life in being, an estate may be settled on him for life, with remainder to his sons as purchasers, in the same way as if he were actually born (*n*).

II. To proceed to the immediate point of enquiry—An important distinction is established between general and particular powers. By a general power we understand a right to appoint to whomsoever the donee pleases. By a particular power it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children (*o*). A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a *fee*, which a particular power may also do, but because it enables him to give the fee to whom he pleases, he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so. Therefore, whatever estates may be created by a man seised in fee, may equally be created under a general power of appointment; and the period for the commencement of the limitations, in point of perpetuity, is the time of the *execution* of the power, and not of the *creation* of it. Thus we have seen, that if A were to convey his estate to his unborn son for life, remainder to the sons of that son as purchasers, the limitations to

(*n*) Thellusson *v.* Woodford, 1 New Rep. 393, where the observation, although addressed to an unborn child generally, is evidently confined by the context to a child *in ventre sa mere*.

(*o*) See Butler's note to Co. Litt. 271, b; and see Powell's note to Fearne's Ex. Dev. p. 327, *n*. (a) ib. 371, 377.

the

the children of the son would be void as tending to a perpetuity; but if A were to convey his estate to such uses generally as he should appoint, he might afterwards, upon the birth of a son, limit the estate to that son for life, remainder to his sons as purchasers, in precisely the same terms as if at the birth of the son he had been seised in fee. Mr. Powell, in one of his notes to Fearne's Executory Devises, admits this doctrine to be true, where the general power of appointment and the fee simple, in default of appointment, are vested in the *same* person by the deed creating the power. But he contends that, where the *act* is *merely* an *exercise* of the power, *capable* of taking effect by *virtue* of the power *only*, the uses limited by the power must be such as would have been good if limited by the original deed; and he illustrates this position in the following manner (*p*): "If A, owner of an estate in fee simple in lands, were to limit them to the use of such person or persons (generally) for such estate or estates, &c. as he (A) should appoint, and in the mean time, and subject to such power, to the use of B in fee; and then A exercised his power in favour of C, a person unborn at the time of the creation of the power, for life, remainder to his first and other sons in fee, so as to make the sons of C take by purchase; he would thereby be enabled to tie up the property, beyond the period of a life in being, and twenty-one years after, computed from the time at which the instrument creating the power bore date (which is the point of time to which our attention must be directed), in the same manner as if such de-

(*p*) Powell's n. to Fearne's Ex. Dev. p. 375.

claration

claration were made in the exercise of a special power; for, in such case, if the appointment were valid, no complete alienation could take place, until the unborn issue of the son of C (if any), he (C) being unborn at the time of the creation of the power, attained twenty-one. Or, taking it in another point of view, the person in whom the fee is vested, subject to the power, could not alien his estate, but subject to be divested by C's issue (if any), and such issue would take the fee simple, under the power, as purchasers, though the unborn issue of a person unborn at the creation of the power."

Now in opposition to the foregoing remarks, we cannot fail to observe, that neither with regard to the limitations themselves, nor to the remainder over, is there any objection whatever on the ground of perpetuity. In regard to the limitations, they are merely such as a man seised in fee might create, and, as the power is equivalent to the fee, the same estates may be created by force of both. To take a distinction between a general power and a limitation in fee, is to grasp a shadow whilst the substance escapes. By the creation of the power no perpetuity, not even a tendency to a perpetuity, is effected. The donee may sell the estate the next moment; and when he exercises the power in strict settlement as if he were seised in fee, he creates those estates only which the law permits with reference to the time at which they were raised. If we are to consider the interests of the remainder-man, no perpetuity in regard to him is created beyond the life of the donee of the power. And when the power is executed, it is immaterial to him what estates are created by it, as in whatever mode the fee is disposed of, his remainder over is defeated. But it certainly is not necessary to advert to his estate as the grand object

object of the law's anxiety against perpetuities—the restraint of alienation—is in this case avoided. The donee may, notwithstanding the remainder over to a stranger, dispose of the estate in the same manner as if he were seised in fee. There appears, therefore, to be no solid principle upon which the distinction taken by Mr. Powell can be supported.

With respect to particular powers, they have a tendency to a perpetuity, which is not obviated by their enabling the donee to limit the fee. For the question in these cases is, not whether the donee *can* limit *a fee*, but whether he can, through the medium of his power, dispose of the estate *as if he were seised in fee* of it. It is well established, therefore, that under a particular power, as a power to appoint to children, no estate can be created which would not have been valid if limited in the deed creating the power. The test of the validity of the estates raised, is to place them in the deed creating the power in lieu of the power itself. Thus, if by a settlement an estate be limited to A for life, remainder to his children as he shall appoint, and he afterwards appoint to a son born subsequently to the settlement for life, remainder to the children of that son as purchasers, read the limitations as if inserted in the settlement in the place of the power, and they will stand thus: to A for life, remainder to his unborn son for life, remainder to the sons of that son as purchasers. Now the limitation to the grandchildren would have been void if contained in the settlement; and it follows therefore, that it cannot be sustained as a due execution of the power.

But it is important in these cases to consider whether the power was *created* by will or deed; this speaks from the execution of it, that from the death of the testator,

so that in the case of a power *created* by will, children born in the testator's lifetime, though *after his will*, stand in the same situation as children born at the execution of the deed where the power is created by deed (*o*). We must be careful not to destroy this distinction by extending it to an instrument *executing* a power, for whether the power be executed by deed or will, the limitation in regard to the question of perpetuity must receive the same construction The point of inquiry is the instrument *creating*, and not the instrument *executing* the power.

It remains to observe, that a power may be given to a person *in esse*, to appoint an estate amongst his grandchildren, or more remote issue born during his life; and even where the power is given generally, yet if he only appoint to such as are living at his death, it will be good (1) (*p*). There is no objection to the due execution of such a power on the ground of perpetuity. And a power to appoint to "issue," includes all issue, however remote, born in due time (*q*).

But although a limitation under a power may be void, as too remote, yet where the power is *executed* by *will*, the courts will construe it as a proper will, and endeavour to put such a construction on the limitation as will bring it within the proper limits. This will be considered hereafter (*r*).

(*o*) Duke of Devonshire *v.* Lord G. Cavendish, 4 Term Rep. 741.

(*p*) Hockley *v.* Mawbey, 1 Ves. jun. 150; Routledge *v.* Dorril, 2 Ves. jun. 357.

(*q*) Hockley *v.* Mawbey, *ubi sup.*

(*r*) *Vide infra*, sect. 8.

(1) As to the effect of an appointment to those born afterwards, *vide infra*, sect. 8.

SECT.

SECTION II.

OF THE CONSTRUCTION OF POWERS IN GENERAL.

We may here consider, 1. What estates may be created under powers in general: 2. The construction of limitations in instruments executing powers; and 3. What acts are authorised by different powers, reserving the consideration of such powers as appear to require a separate discussion.

And 1. Where the intention is clear, a power may enable the disposition of a fee, although no words of inheritance are used, as where a testator gives a power to *sell* lands, the donee may sell the inheritance, because the testator gives the same power he himself had (*a*). So a general power to dispose of an estate in favour of a particular object will authorise the limitation of a fee, although no words of inheritance are contained in the power. This was decided in the 26 Car. 2. in a case which underwent great consideration (*b*). The devise was to the testator's wife for life, "and by her to be disposed of to such of my children as she shall think fit." It was agreed that the wife took for life only, and that the power to dispose did not relate to her life estate; but the question remained as to what estate the wife was authorised to limit to the children. Upon the second argument, Vaughan Chief Justice, and Atkins, seemed to incline that she should have power to

(*a*) Liefe *v.* Saltingstone, *infra.*
(*b*) Liefe *v.* Saltingstone, 1 Mod. 189; 1 Freem. 149, 163, 176; 2 Lev. 104; Cart. 232.

dispose of an estate for life only, because if the testator had said, *I dispose of it to my son,* it would have been but an estate for life. But Windham and Ellis held otherwise, as there was a difference between a devise of an interest and a power; and they granted, that if the testator had said *I dispose of it to my son,* it would have been but for life; but here the testator gives a power to dispose, which seems to imply such a power as he himself had, which was to dispose of the fee (1) (*c*). After another argument, Atkins came over to the opinion of Windham and Ellis, and they three pronounced judgment in favour of the power enabling a limitation of the fee. But Vaughan Chief Justice dissented from his brothers, on the ground, that the wife was merely to nominate what person should take by the will, the plain signification of which was, "I bequeath the estate to such of my children as my wife shall think fit, at her disposal;" and by this way the children would take it expressly by the gift of the testator; and the words (at her disposal) are with relation to the children and not to the estate; and when she hath disposed of it to any child, that child shall have but an estate for life. But he added (with some want of decorum) *subirascens, sententiæ numerantur non ponderantur.*

In Leonard Lovie's case (*d*) the uses of a feoffment were declared to L^, to the use of the settlor for life, with power to make leases, and then to the use of the

(*c*) See 1 Freem. 164. (*d*) 10 Rep. 78.

(1) Levinz states, from the relation of a friend, that Vaughan and Atkins were in favour of a fee, and Windham and Ellis *contra;* but he was misinformed, 2 Lev. 104; *nom.* Sir Richard Saltonstall's case.

performance

performance of his will, and to the use of such person and persons to whom he should devise any *estate or estates* in the premises; and it was holden, that without question he might devise the land to any person in tail or fee.

And in a recent case in the court of King's Bench (*e*), the testator, after an estate for life to his grand-daughter, gave the estate to the lawful *issue of her body, in such parts, shares, and proportions, manner and form* as she should appoint, and in default of appointment, to the children (as the court determined) in fee. My Lord Ellenborough, in delivering the judgment of the court, said, that this power in the course of the argument, was said, but not much pressed, to be only a power to appoint to her children in tail; and if that were so, it would furnish an inference, that the limitations which were to take place in default of appointment were intended to be of the same nature. But the court thought that this devise gave a power to appoint in fee; for admitting that there might be ground to contend that the power was only to appoint in tail, if the power of appointment had only been "to the use of her lawful issue, in such parts, shares, and proportions as she should direct;" upon which it was not to be understood that they gave any opinion (*f*); yet when the words "manner and form" were added, there could be no doubt but that in order to give them some effect (and every word, if it could, ought to be made operate), something more must be understood than merely a power of unequal division of an estate, to be limited in a certain

(*e*) Rex *v.* the Marquis of Stafford, 7 East, 521.

(*f*) See Phelp *v.* Hay, MS. App. No. 11.

course of descent: and if they did mean any thing beyond a power of division, they must import a power of determining the nature and quantity of the estate the issue should take: and if so, the mother might appoint estates in fee to all or any of her children.

It was not observed in the preceding case, that in Godolphin *v.* Godolphin (*g*), Lord Hardwicke thought that the words *manner and proportion* would not enable a limitation further than for life, although indeed this case depends too much on its own particular circumstances to be cited as a precedent.

In a case before the present Master of the Rolls (*h*), the testator, after devising an estate to his wife for life, gave it "unto and amongst all and every our children in such *manner* and in such proportions as she shall appoint." He then empowered his wife to sell the estates, and to lay out the money and receive the interest for life; and after her decease he directed and appointed the same, both principal and interest, to be paid "to and among our children in such proportions as aforesaid." The widow made no appointment. The Master of the Rolls said, that though in the devise of the lands in the first part of the will there were no words of inheritance, yet in the subsequent part, the testator giving his wife power to sell the estate, and appointing the money, both principal and interest, among the children; as the testator could not be supposed to intend to give them a larger interest in that part than in the former, they took several estates of inheritance.

(*g*) 1 Ves. 21.

(*h*) Casterton *v.* Sutherland, 9 Ves. jun. 445.

It

It should seem, therefore, that the Master of the Rolls thought that the power did not authorise a limitation of the fee, but he was not called upon to deliver an opinion on the point. Upon the authority of Leife *v.* Saltingstone, and the opinion of the court of King's Bench in the Marquis of Stafford's case, he would perhaps have been of opinion that a fee might be limited, had it been necessary to decide the question. For in all these cases it is quite clear that the testator means the fee to pass, and the word *manner*, or any word of the like effect, may well be construed in favour of the intention to mean in such mode *as to the quantity of estate to be given*, as the donee shall think fit. The case of Leife *v.* Saltingstone has been entirely overlooked in the modern cases, although it is a most important authority in favour of that construction which all mankind must wish to prevail—a construction that effectuates the testator's intention.

At law, a particular power of charging lands will not authorise a limitation of the fee as a security for the sum to be raised.

Thus, in Jenkins *v.* Keymis (*i*), a tenant for life under a settlement having a power to *charge* the land with 2,000*l.* conveyed the inheritance, without referring to the power, by way of mortgage for securing 2,000*l.* and interest, and it was determined, both at law and in equity, that the power was not executed. Hale, Chief Baron, said, that the power might have been well executed by a grant of the land until 2,000*l.* was raised by the profits, or by a declaration of use until 2,000*l.* was received, or by a deed charging the land with the sum,

(*i*) 1 Lev. 150; Hard. 395; 1 Cha. Ca. 103.

but he doubted whether a release of the inheritance was within the power, for by this mode all the subsequent estates would be destroyed, which was not the intent of the parties.

But it should seem, that at this day if a clear intention appeared to execute the power, equity would consider such an execution as that in Jenkins *v.* Keymis a substantial, although defective execution, and would relieve against the defect in favour of the mortgagee; and it has been ruled, that in equity an unlimited power to charge an estate will authorise a disposition of the estate itself, in trust to sell and divide the money amongst the objects. This was decided by Lord Resslyn in Long *v.* Long (*k*), where the estate was limited to the father for life, remainder to the wife and issue in strict settlement; and power was given to the father, in case there were any younger children, to charge the estate with the payment "of such sum or sums of money," for the benefit of the children as he should think fit. By his will he directed the estate to be sold, and gave the money amongst his children, giving the eldest son a very small portion. The bill was filed for sale of the estate, and the Chancellor stopped the argument, and treated the point as clear. This appointment he said was *in substance* exactly what he had a right to do. The present Master of the Rolls, addressing himself to this judgment, said, that it determines this, that to enable a person to sell land, it is not necessary to have

(*k*) 5 Ves. jun. 445; Reg. Lib. B. 1799, fo. 1023. The plaintiffs insisted, that under the power the whole value of the estate might be appointed so as totally to exclude the eldest son.

that

that authority given to him (*l*). The terms of the settlement in Long *v.* Long, gave room in a peculiar degree for that implication; for it might be contended that was only a power to charge; and the estate was to be in possession of the eldest son. Of necessity it was to be implied, that the estate was to be permitted to remain in the eldest son, to bear the charge; and therefore nothing but a charge could be intended. But it was held, that as there was nothing to restrain him in the amount, and he might have charged the utmost value, he had done only what was equivalent to that. It was supposed, the eldest son had all he was entitled to, if he had in money all he could have claimed in land.

It is to be regretted that so important a decision as that in the case of Long *v.* Long, should have been pronounced without all the arguments which might have been adduced against it having been heard. The case of the Earl of Tankerville *v.* Coke (*m*) might have been cited. In that case a particular power of jointuring was given to a tenant for life, and a general power to charge the lands with portions for younger children. The tenant for life charged the lands with very heavy sums. It was insisted that the court would cut down the power as unreasonable, *as it appeared that the testator designed the estate to remain in the family.* Lord Ch. King assisted by Lord C. J. Raymond, and Mr. Baron Comyns, held that the donee had restrained his power by his marriage articles, so that it became unnecessary to decide the point, but all the three Judges

(*l*) See 6 Ves. jun. 797.

(*m*) Mose. 146, and see Lord Hinchinbroke *v.* Seymour, *sup.* p. 215.

expressed

expressed their opinion that the power was under the influence of the court, and that an unreasonable execution of it would be relieved against. The case of Long *v.* Long, opposed, as it appears to be, by the well-considered case of Tankerville *v.* Coke, can scarcely be considered such an authority as will controul any future decision, should the principle upon which it was decided not be approved of.

The converse of the decision in Long *v.* Long, viz. that a power to grant the land, enables a charge of a sum of money on the land, has also been decided. This was determined by Lord Hardwicke in the case of Roberts *v.* Dixall (*n*) where a father had a power *to appoint and divide* the estate among his younger children, in such proportions as he should think proper. The father intending to exercise his power, gave a gross sum to the only younger child, and charged it on the estate; and Lord Hardwicke decreed that the power was *in substance* well executed. It was true, he said, that the direct terms of the power were not pursued, but the intent and design of it were. *It was admitted that the father might have appointed part of the estate to be sold, and the money raised by such sale*; and what was done was exactly the same thing, the court might order a sale. It was the same to the heir or remainder-man, which way the child was to be provided for, only that giving a portion of the estate might be a means to tear it to pieces, whereas now the estate would be kept entire; and it was better for the daughter, and perhaps

(*n*) 2 Eq. Ca. Abr. 668, pl. 19; S. C. Appendix No. 12. The facts and decree stated from Lib. Reg.

thought

thought so by the testator, that she should have a sum of money, than a small estate, *and though the will might not enure as a good execution of the power in strictness,* yet within the meaning and design of it, it was a good charge for the young lady's benefit.

The case put by Lord Hardwicke in the preceding decree, as admitted in argument, occurred in specie in the late case of Kenworthy *v.* Bate *(o)*. The parent had an exclusive power of appointing to any of his children. He gave the estate to trustees, to sell and divide the money amongst his children. The Master of the Rolls treated this case as infinitely less strong than Long and Long, which as we have seen was a direct determination, that a power to charge, includes a power to sell, and the learned Judge thought it followed, that a power to give includes a power to sell, for the purpose of giving the money instead of the land.

In a case of frequent reference, prior in point of time, even to the case of Robarts and Dixall, under a power to appoint to children *for such estate and estates,* and in such *shares and proportions* as the parent should think fit; he limited a rent charge to his youngest son and the heirs of his body, and in default of such issue, he charged the estate, which would then go to his eldest son under the settlement, with portions for his daughters *(p)*. The execution of the power was resisted by the eldest son, as the testator might, it was said, have distributed the land amongst his younger children in what propor-

(*o*) 6 Ves. jun. 793.

(*p*) Thwaytes *v.* Dye, 2 Vern. 80; Raith. ed. 3 Cha. Ca. 69.

tions

tions he thought fit, but had not power to devise a rent charge, or sums of money; but the court over-ruled this plea to the daughters bill for their portions, and the decree was affirmed in the House of Lords.

But it has been determined at law by three Judges against one, that a limitation to the use of such persons as A should appoint *for such interests or otherwise* as he should specify, did not authorise a limitation of a rent-charge, but a disposition of the estate of the land only (*q*).

In the Earl of Bath's case, Mr. Baron Powell, addressing himself to the case of Thwaytes and Dye, said, that one great question was, whether the power being to limit estate or estates, he might limit a rent out of those lands: It was held in equity he might, and truly he thought that he might at law. There was, he confessed, an opinion against it in the case of Browne *v.* Taylor, where there were three Judges against one, but really he thought it was good in law (*r*).

From the present temper of the courts, there is great reason to suppose, that in a case like Thwaytes *v.* Dye, it would, agreeably to the opinion of Mr. Baron Powell, be determined, that a rent-charge might be limited even at law. There is no magic in words. "Estate or estates," mean quantity of interest, and a rent-charge is clearly a portion of the entire interest in the land. Such a determination, therefore, would be authorised, as well by the spirit as the words of the power. In Browne *v.* Taylor, the words were strongly in favour of the power to limit a rent, and Croke Justice was of that opinion. It scarcely admits of doubt, that in a similar case the courts

(*q*) Browne *v.* Taylor, Cro. Car. 38; and see Lord Arundel *v.* Earl of Pembroke, Dy. 263. (*r*) And see Middleton *v.* Pryor, Ambl. 393.

would

would, at this day, decide, that a legal rent might be limited under the power.

The principle of the late decisions, it must be observed, has been extended in practice, and some gentlemen treat the case of Kenworthy and Bate as a decision that the power was *legally* executed. It cannot be discovered from the decree what the meaning of the court on this head really was. The decree merely declares the power to be well-executed, and orders a sale in which all proper parties were to join (*r*). We have seen, however, that the case of Thwaytes and Dye was deemed an equitable execution only; and Lord Hardwicke admitted, that in Robarts *v.* Dixall, the power was not *legally* executed. Of course in Long *v.* Long, the execution was deemed valid in equity only (*s*). In most of these cases it may well be held that the power is *substantially* executed, but consistently with the established rules on the construction of powers at law, it would require a considerable stretch to determine that a power to *charge* includes a power to *give the estate itself,* or that a power to give the *estate* to *one,* enables a gift of it to *another* to sell for his benefit. The trustee in that case is not an object of the power, and the courts of law might perhaps consider themselves bound not to advert to the trust. But the party not being an object of the power, is of itself a sufficient objection to the execution at law; for in Hervey and Hervey under a power of jointuring, Lord Hardwicke considered it clear, that no conveyance could be pursuant to the power, but what was *to the wife* her-

(*r*) Reg. Lib. A. 1801, fol. 1000.

(*s*) See Reg. Lib. B. 1799, fol. 1023. The eldest son was directed to join in the conveyance when of age; and see Jenkins *v.* Keymis, *supra.*

self

self only (*t*). Nor is the case of Peters *v.* Masham, which will be hereafter stated, an authority against this rule, as there it was considered that the donee had only to select the land, and not to limit the estate (*u*). The cautious practitioner, therefore, will hesitate before he considers these as cases of *legal* executions. To make them so, a power to give the estate to A, must be read, as if it authorised a gift to any other person for his benefit. Even in cases like Thwaytes *v.* Dye, and Browne *v.* Taylor, a court of equity could scarcely hold the power *legally* executed without the last case having first been over-ruled in a court of law.

A power to grant a rent-charge on any part of the estate of a particular value, will not even in equity authorise a charge of the rent on the entire estate, as in such cases the intent is, that the whole estate shall not be incumbered (*x*) ; so a power to settle part of the land of a given value, will not authorise a grant of a rent-charge of the same value on the whole estate (*y*), but equity, where there is a proper consideration, will of course relieve against the defective execution.

In Whitlock's case (*z*), it was laid down and agreed to by the whole court, that under a power to make an estate for three lives, the donee cannot make a lease for ninety-nine years determinable upon three lives.

But in that case a distinction was taken between such a particular power affirmative and a general power restrained with a negative, as a power generally to make leases, with a proviso that they should not exceed three

(*t*) 1 Atk. 563, 564.

(*u*) Fitzg. 156, Fortes. 339, *infra*, sect. 8, 11.

(*x*) Hervey *v.* Hervey, 1 Atk. 561.

(*y*) Earl of Tyrconnel *v.* Duke of Ancaster, 2 Ves. 500.

(*z*) 8 Rep. 69, b. S. C. 1 Brownl. 169, nom. Chappel *v.* Whitlock.

lives

lives or twenty-one years; under which it was determined, that he might make a lease for ninety-nine years, determinable on three lives, because the power was absolute and indefinite; and the proviso of correction is added, that the lease shall not exceed three lives or twenty-one years; which clause is negative, and qualifies the generality of the first proviso; and a lease for ninety-nine years, determinable on three lives, *does not exceed* three lives, although in truth it is not a lease for lives.

The first resolution in Whitlock's case appears to have been much debated in a case called Rattle *v.* Popham (*a*), where, under a power to a tenant for life in a marriage settlement to limit the estate to any woman he should marry, for her life, by way of jointure, and in bar of dower, he made a lease for ninety-nine years, determinable on the death of his wife; and it was determined in the court of King's Bench, whilst Lord Hardwick was Chief, that however she might be entitled to relief in a court of equity, it could never be said to be an execution of the power: for the estates are very different, one being a freehold and the other a chattel, and the freehold in her being a qualification to any future husband to be a member of parliament, kill game, &c. And the court founded their decision on Whitlock's case, and treated it as a very plain case.

In a case before Lord Mansfield, he said, that in the case of Rattle *v.* Popham, the court thought themselves bound by Whitlock's case, and held the lease not to be warranted by the power. The widow brought her bill in the court of Chancery; and Lord Talbot, arguing

(*a*) Str. 992; Cunn. 102; and see 2 Ves. 644; and see accordingly Churchman *v.* Harvey, Ambl. 335: the same point decided.

from

from the same premises, the power and the lease, without any other circumstance, held the lease to *be* warranted by the power. He said it was *not a defective*, but a blundering execution: and he decreed the defendant to pay all the costs, both at law and in equity (*b*).

Lord Mansfield adduced this decision of Lord Talbot's in support of his favourite doctrine, that whatever was an equitable ought to be deemed a legal execution of a power. In a late case before Lord Redesdale, in which he combated this doctrine, he said, that if Lord Mansfield found fault with the decision in the case of Rattle *v.* Popham, as he was represented to have done, he (Lord Redesdale) thought, with deference, that there was no ground for the remark (*c*); and indeed, notwithstanding Lord Mansfield's assertion, it appears, from a manuscript note of the case, which will be found in the Appendix to this volume, that Lord Talbot admitted clearly that the power was *not* well executed *at law*, but he relieved the wife against the defective execution, on the general rule of equity (*d*); and on the same principle, viz. relief of equity against the defect, Lord Nottingham, when Lord Keeper, is reported to have said, that the resolution in Whitlock's case might be laughed at (*e*).

The result of the authorities appears to be, that where a freehold interest is authorised to be appointed under a power, a different species of estate, although less valuable as a term of ninety-nine years determinable with the life, cannot at law be granted. But that in equity

(*b*) 2 Burr. 1147.
(*c*) 1 Rep. T. Redes. 71.
(*d*) S. C. nom. Newport *v.* Savage, MS. App. No. 13.
(*e*) 1 Freem. 308.

such

such an execution will be supported, because less than the power is effected, and it clearly appears how much less: if the appointee should outlive the ninety-nine years, the estate, as to the residue of his life, will be undisposed of, and will go over to the remainder-man, or other person entitled (*f*).

But although a different interest cannot be given from that designated in the power as a chattel interest instead of a freehold, yet it seems, that where the nature of the interest is the same, the appointment will be good at law as well as in equity, although the power is not executed to its fullest extent.

Of course, if a power expressly require that an estate in fee, and *no other* shall be appointed, a less estate than a fee cannot be limited; and even where a power authorises the appointment of a fee, and there are not any express words of restriction, it has been considered in practice, that a less estate cannot be given (*g*). But in the case of Bovey *v.* Smith, it was said by the court, that such a power may be executed at several times; an estate for life may be appointed at one time, and the fee at another time (*h*). And the case of Phelp *v.* Hay (*i*) appears to be a direct authority, that, under a power to appoint to one or more of several objects, *their, his or her heirs and assigns,* in such manner, form, &c. as the donee may choose, an estate tail may be given. The words there were peculiarly strong. The limitation which was in a deed was, to the use of three children, or to any or either of them, their, his or her heirs and assigns,

(*f*) See 2 Ves. 645; Churchman *v.* Harvey, Ambl. 335.

(*g*) See Snape *v.* Turton, Cro. Car. 472.

(*h*) 1 Vern. 84.

(*i*) MS. Appendix, No. 11.]

in such manner and form, and by and after such rates, shares and proportions, and charged and chargeable with such sum and sums of money unto and amongst any or either of them, and at such time or times as the mother should appoint: in default of appointment to the children as tenants in common *in fee*. The donee appointed a sum to one child, and the estate, subject to that, to another (as the court determined) in tail, with remainder to the first in tail. And Sir Thomas Sewell, Master of the Rolls, decreed in favour of the appointment.

In ill-penned powers of sale, it sometimes happens that the party is authorised to appoint the estate to the purchaser, his heirs and assigns, which should never be done *(k)*; for it has in this case also been contended in practice, that the estate can only be appointed to the purchaser in fee, and not to uses to bar dower, or to any other uses which the case may require. To obviate this difficulty, where it was intended to bar the purchaser's wife of dower, it has been recited (contrary to the fact) that the contract was entered into by A, as agent for B, the real purchaser, and the estate has been conveyed to A, in fee, in trust for the purchaser. But upon the authority of Phelp and Hay it may be thought that the doubt in this case is not founded. If it be founded, then there is great reason to contend that the estate *must* be conveyed to the purchaser himself in fee, and that a conveyance to a fictitious purchaser as a trustee would be absolutely void, he not being an object of the power. But really, when it is once admitted that the intention of the power is to be regarded, and not the

(*k*) *Vide supra*, p. 166.

precise

precise terms of it (*l*), there seems to be no ground for this practice. The *intention* expressly is, that the inheritance of the estate shall be sold, but the mode of the conveyance rests in the breast of the purchaser. The direction simply amounts to a declaration, that the fee shall belong to the purchaser. It merely expresses what would be implied in the power, in the absence of an express provision, it being clear, that a power to trustees to sell an estate will authorise them to appoint the estate to the purchaser in fee, although the power be silent on that head. Now, if the direction were wholly omitted, it would scarcely be doubted that the estate might be conveyed to any uses the purchaser should desire. Therefore, according to the rule of law, that *expressio eorum quæ tacite insunt nihil operatur*, it may be contended, independently of decision, that although the trustees of the power are only authorised by the words of it, to appoint the estate to the purchaser in fee, yet they may appoint it to uses to bar dower, or in any other manner that the purchaser may direct.

The case of Phelp and Hay only shews that a less interest may be appointed than that authorised where the interest is a freehold. But the same principle applies to chattel interests; nor are cases wanting on this head. In the case of Briers or Breers and Boulton (*m*) (which like most of the cases in the same reporter it is scarcely possible to comprehend), it seems to have been holden at law, that under a power to grant an annuity till 200*l.* was received, an annuity might be granted till a less sum was raised; and Jones and Twisden said, that on the statute for leases otherwise than for three

(*l*) See Morris *v.* Preston, *infra*. (*m*) 3 Keb. 692 745.

lives or twenty-one years, a lease for less is good, which is a clear point. And in the case of Harris *v.* Bessie (*n*), a power was given to devise 300*l.*; and the donee disposed of 200*l.* by fifties, and it was held good by the court, and they took a distinction between a power of attorney to make a lease, and a power reserved for that purpose. In the first case a lease cannot be made for less, in the last it may.

Where a power is to lease for any term or number of years *not exceeding* a given number, a lease may of course be made for any term within the limit.

In Winter *v.* Loveday, a question arose upon a complicated power, whether it authorised a lease for a term absolute or dependent upon lives (*o*). The power was to lease, "if in possession for one, two, or three lives, *or for* the term of thirty years, *or for* any other number or term of years, determinable upon one, two, or three lives, or in reversion *for* one or two lives, or *for* the term of thirty years, or *for* any other number or term of years, determinable on one or two lives." Mr. Justice Rokeby held, that a term could only be granted determinable upon lives; but Lord Chief Justice Holt and Turton, and Eyre Justices, held, that a lease for thirty years absolutely was good within the proviso; for the words of the proviso were for one or two lives, or for the term of thirty years, or for any other number or term of years, determinable on one or two lives, &c. where the repetition of the particle (for) disjoins and separates the sentence, and makes so many distinct clauses, so that the donee had power to make leases

(*n*) 1 Keb. 347. (*o*) 1 Com. 37, and other books.

either

either for one or two lives, or for thirty years, or for any number of years, determinable on one or two lives; he had his election to make the one lease or the other; if he could not lease but for thirty years determinable on two lives, the preposition (for) in the clause (for the term of thirty years) would govern the whole sentence, which would have been penned in this manner, viz. For the term of thirty years, determinable, &c. or rather, for any term or number of years, determinable on one or two lives; for if such a construction were to be made, what occasion would there be for these words (for the term of thirty years)? They might be entirely omitted; but as the sentence runs, for the term of thirty years, or for any other number or term of years, such repetition or reiteration makes them distinct clauses; and as the first (for) governs the first clause (for the term of thirty years), so the last preposition (for) governs the latter clause (for any term or number of years determinable, &c.) and explains the intent of the parties to be, that leases might be made for any number of years determinable on lives, so in like manner for thirty years absolutely.

In the case of Lutwich and Piggot (*p*), the power was to demise for three lives or *twenty-one years*, or under *or for any term of years*, upon one, two, or three lives, *or* as tenant in tail in possession might do. It was insisted, that a lease for twenty-one years only could be granted determinable upon lives; but the court, with great reason, supported a lease granted under the power for ninety-nine years, determinable upon three lives.

(*p*) 3 Mod. 268.

A general power to a tenant for life to grant a term or estate, without specifying the duration of it, will enable him to grant a term beyond his own life, altho' it defeat the remainders over, for otherwise the power would be merely idle and void, as every tenant for life may alien the estate during his own life (*p*).

A power to grant an interest in possession will not of course, authorise a grant in reversion. What amounts to a reversion is a question which generally occurs only on leases, and shall therefore be reserved for the next chapter. In the same place we shall have occasion to consider in what cases concurrent interests can be granted (*q*). But we may here notice, that although a reversionary interest should be granted when the power authorises a grant in possession only, yet equity will in some cases supply the defective execution of the power, where there is a meritorious consideration in the appointee (*r*).

In considering the extent of a power, the intention of the parties must be the guide. Thus on the one hand a power limited in terms, has in favour of the intention been deemed a general power, whilst on the other hand a general power in terms has been cut down to a particular purpose.

The case of Talbot *v.* Tipper (*s*) is an instance of the first construction. In a settlement by Sir John Fortescue, he reserved a power to make leases with fine or without fine, *and rendering such rents and services as he should think fit.* He made a lease without reserving *any* rent; and it was objected, that some rent ought to

(*p*) Hele *v.* Green, 2 Ro. Abr. 261, pl. 10. (*q*) Chap. 10. sect. 3. (*r*) Anon. 2 Freem. 224. (*s*) Skin. 427.

be reserved, and there not being any, his power was not well executed; but the objection was overruled, because it being to reserve such rent as he should think fit; and he having thought fit to reserve no rent, this should not avoid the execution of the power, and especially he not having said such *yearly* rent; so that a pepper-corn reserved payable forty years after would have been sufficient, and therefore such matter should not be regarded as a cause sufficient to avoid the lease, where he had made it subject to a trust to pay the rents, issues, and profits to such persons as he should direct.

In the late case of Morris *v.* Preston (g), it appeared that in a settlement powers of sale and exchange were given to the trustees to preserve contingent remainders. And there was a power in case of the death of any or either of the trustees for the husband or wife or the survivor *with the consent of the surviving co-trustee or co-trustees,* to appoint a new trustee or trustees, and upon such appointment the *surviving co-trustee* should convey the estate, so that the *surviving trustee and trustees,* and the new trustee or trustees might be jointly concerned in the trusts, in the same manner as such *surviving trustee* and the person so dying would have been in case he were living. The purchaser objected to the title of the trustees under the power of sale, because they were not appointed until the death of *both* the trustees under the original settlement, which was not authorised by the power; but the objection was waved without argument. Now the power in terms clearly did not extend to the event which happened, it contemplated only an appointment on the death of one trustee, and not an appoint-

(g) 7 Ves. jun. 547.

ment after the death of both, but the ground on which the plaintiff's counsel waved the objection, must be, that the *intention* of the power was, that new trustees should be appointed whenever circumstances might require it. Clear as this point appears to be, it is to be regretted that the opinion of the court was not taken upon it. It has more than once happened, that what counsel have given up in argument, the court have enforced.

An example of the second kind is exhibited in the case of Bristow *v.* Warde (*h*). There by marriage articles funds of each party were agreed to be settled on the husband and wife, and then as the husband should appoint *generally*, and in default of appointment to the children of the marriage as usual. It was insisted that his power was indefinite, and not confined to children. But Lord Rosslyn, after observing that the articles were made in order to secure a provision for the intended wife, and the issue of the marriage said, that it would be a forced construction of articles, to hold that a provision to be made for children, in default of appointment to be equally distributable, in the case of an appointment should be subject to his debts; which would be the necessary consequence of holding that he had an indefinite power of appointing; for if he had that indefinite power, it would be assets; he might appoint to any one; his creditors could affect it; and if he executed his power for the children, the children must take it subject to the debts of their father It was not, he added, the natural frame of such a settlement, nor was it the construction of the words of this. It was clear the power of ap-

(*h*) 2 Ves. jun. 336.

pointment

pointment was not indefinite; but was confined to the issue.

The cases of Lord Hinchinbroke *v.* Seymour (*i*), and the Earl of Tankerville *v.* Coke (*k*), which have been already noticed, are also strong authorities that a general power may be restrained to a particular purpose, where the intention of the parties demands such a construction. And in Mildmay's case in my Lord Chief Justice Coke's first report (*l*), the estate was settled in default of issue male, on the settlor's three daughters in tail, with cross remainders. And it was provided, that Sir Henry, the settlor, might "limit any part of the lands to any person or persons for any life, lives, or years for the payment of his debts, performing of his legacies, preferment of his servants, *or any other reasonable considerations* as to him should be thought good." One of the daughters died, whereby the two others became seized of the entirety, and Sir Henry limited a great part of the land to one of the surviving daughters and her husband for a thousand years without reserving any rent. And upon these words in the proviso (other considerations), it was held that this word (other) could not comprehend any consideration expressed in the indentures before the proviso; for (other) ought to be other in nature, quality, and person, and the advancement of his daughters is the consideration mentioned before. And it was resolved, that the limitation of a thousand years was as well against the intent of the parties, as against the words of the pro-

(*i*) *Supra*, p. 215.
(*k*) *Supra*, p. 362.
(*l*) P. 175, a.

viso,

viso, for the intent was to make distribution of his lands amongst his three daughters, and the heirs of their bodies; but if this limitation should be good, it would frustrate the estate of the other sister, and defraud the intent of the parties grounded upon a consideration of marriage. And this limitation for a thousand years, without any rent reserved, seemed also to be against the words of the proviso, for that cannot be called a reasonable consideration which tends to the subversion of the estates settled by the indenture upon good consideration, against the meaning of the parties.

Where a power is given to appoint a fund (whether real or personal, and of whatever tenure) amongst several objects either *in esse*, or to be born, and the fund is in default of appointment, given amongst the objects of the power, if there should ultimately be but *one* object of the power, an interest cannot be limited to him under the power, determinable on the happening of a particular event, as his death under twenty-one without issue.

This was decided in the case of Doe *v.* Denny (*m*). There under a marriage settlement the estate was limited to the use of such child or children of the marriage, and for such estate and estates, and subject to such powers, conditions, provisoes, and limitations as the wife should appoint; and in default of appointment, to the use of the children in fee, and in default of issue, then as the wife should appoint generally. There was only one child of the marriage, and the wife, by virtue of her powers, devised the estate to her son in fee; and in case he should die under twenty-one, *and without is-*

(*m*) Say. 295, reported; 2 Wils. 337, cited.

sue

sue (1), then over. The court said, that it was clearly the intention of the parties to the settlement, that the issue should take an estate in fee, and after shewing that the *general* power given to the wife never arose (*n*), they held that the son took an estate in fee under the devise to him, or an estate in fee under the marriage settlement; and, in one report, it is said that the wife could not alter the estate of the son.

In the later case of Roe *v.* Dunt (*o*), a copyhold estate was surrendered to the child or children of the marriage in such proportion and proportions, and for such estate and estates as the husband and wife, or the survivor should appoint; and in default of appointment, then to all the children in fee as tenants in common; and for want of such issue to the husband in fee. The husband who survived his wife, appointed to the only child of the marriage in fee when she attained twenty-one; but if she died under twenty-one, then he gave the estate over; and the whole court of C. B. were clearly of opinion, that the husband had no power to make such appointment; but there being only one child of the marriage, *that* child was entitled to the whole estate in fee. But Lord Chief Justice Wilmot said, that he thought *a single child in such a case as this might be made tenant in tail.* This case was decided on the authority of the preceding case of Roe and Dunt, but the court thought the case at bar was a stronger case; for if this power could have taken place, and the child had died under

(*n*) *Vide supra* p. 219. (*o*) 2 Wils. 336.

(1) These words, which are very important, are not noticed in Sayer's report.

twenty-

twenty-one, *and left issue,* that issue would have been disinherited.

It is observable, that neither of the foregoing cases is an authority, that where the power authorises, not merely a distribution as to shares, but also an appointment of the quantity of estate, or interest in the land to be acquired by the objects of the power, the donee cannot limit a less estate than a fee to the sole object of the power, *so as an absolute and not a defeasible estate be limited.* On the contrary, Lord Chief Justice Wilmot expressed his opinion, that a single child might in such case be made tenant in tail, and by a parity of reason the child might be made tenant for life, although a limitation for life would be nugatory where the object takes an estate of inheritance in default of appointment, as the estate for life limited to him under the power, would merge in the estate of inheritance. But Mr. Serjeant Wilson, the reporter, adds a quere to the opinion of the Lord Chief Justice in Roe and Dunt, on the question under consideration. He does not, however, advance any argument against the opinion, nor perhaps would it be easy to frame one. Where the power, as in that case, authorises an appointment to the *child* or children of the marriage, for such *estate and estates* as the donee shall limit, the words of the instrument cannot be satisfied without giving the donee a power to limit the *quantity of estate* to be taken by a single *child,* the only object of the power. A contrary construction would lead to endless difficulties. Suppose there to be two objects of the power, it will be admitted that an appointment of the estate to them in tail, with cross remainders between

between them in tail would be good, then take it that one dies in the lifetime of the donee of the power without issue, so that the survivor becomes the only object of the power, can it be seriously argued that the appointment would in that event become void, and that he would take the fee under the limitation in default of appointment; and if this appointment be good, does it not follow on the same principle that an appointment to a single, and the only object of such a power in tail, is equally valid?

But where the power simply authorises an appointment of the *shares* to be taken by the objects, the power necessarily ceases when there is only one object, as he of course must take the whole.

Thus where by marriage articles, leaseholds for lives were agreed to be conveyed to trustees to the use of the issue of A and B, in such shares and proportions as A should appoint, and for want of appointment, to go to the children equally. There was only one child; and Lord Redesdale held, that this power was only to limit proportions, and that only in the event of the existence of more children than one; consequently the power never arose at all, there having been only one child capable of taking under the settlement, and the instrument, he added, was to be considered as if the power had not been inserted (*p*).

In the cases hitherto discussed, it is of course assumed, that the object of the power takes the estate under the settlement *in default of appointment*; for it is clear,

(*p*) Campbell *v.* Sandys, 1 Rep. T. Redesdale 281; and see Folkes *v.* Western, 9 Ves. jun. 456, where the power only extended to the case of several objects.

that

that if the object can only take the estate by an execution of the power, it may be appointed to him. And even if he take a share of the estate in default of appointment, yet the entirety may be appointed to him. This was decided by Lord Thurlow in a case where a power was given to appoint personalty amongst children, and in default of appointment, the fund was given to the children equally to be vested at twenty-one, although they died in the lifetime of the donee of the power. There were two children, one of whom attained twenty-one, and then died, and the donee appointed the entirety to the surviving child. Lord Thurlow said, that where there are only two children, the power by way of exercise of discretion is totally gone by the death of one before it is exercised, and it cannot be the same power in point of extent, as when meant to be a distribution among several, for which it is necessary there should be several. But this clause made it proper for the donee to express, that she did intend the power to be executed. If there was no appointment, the consequence was, each would be entitled to a moiety, because there was no appointment. In respect of that clause, she had a power to appoint to one only; for though that was not a distribution, it was an expression that it should go by appointment, and not transmit for want of it. And he decreed accordingly (*q*).

And here it may be observed, that where a power is given by will to appoint an estate amongst several objects, and the estate in default of appointment, is given to them as tenants in common, the death of any of the objects in the life of the testator, will *pro tanto*, defeat the

(*q*) Boyle v. Bishop of Peterborough, 1 Ves. jun. 299.

power

power and devise over, so that the power and devise will only remain as to the shares of the survivors (*r*) (1). But as it is clear, that under a devise to several as joint-tenants, the share of any dying in the testator's life-time does not lapse, but goes over to the survivors (*s*), it should seem, that where the estate in default of appointment, is given to the objects of the power in joint-tenancy, as the survivors would take the whole in default of appointment, the power itself ought still to ride over the entirety, and not be confined to the shares of the surviving objects.

II. Secondly, *As to the construction of limitations in instruments executing powers.* A power may be executed by any act *inter vivos* or by will. In the execution of powers by deed or other act *inter vivos*, technical expressions are as necessary in the limitation of the estate as in feoffments or gifts at common law: Therefore, if under a power the estate be appointed to A, and the deed express or limit no estate, the appointee will take an estate for life only (*t*); so if the estate be limited to A for life, remainder to his issue male, the father

(*r*) Reade *v.* Reade, 5 Ves. jun. 744; Casterton *v.* Sutherland, 9 Ves. jun. 445.

(*s*) Davies *v.* Kempe, Cart. 2; and see 1 Salk. 238; Doe *v.* Underwood, Willes, 293; Peat *v.* Chapman, 1 Ves. 542.

(*t*) See Co. Litt. 42 a.

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(1) This is the point which this case appears to have decided, but it is not easy to collect the fact; see 5 Ves. jun. 744; 8 Term Rep. 118. The decree does not advert to the grounds of the decision. The defendant claimed as the survivor of the four children. Reg. Lib. B. 1800, fo. 708.

would

would take for life only, and his sons would take as purchasers and joint tenants for life. Again, a limitation to A for ninety-nine years, and a subsequent limitation to his heirs, or the heirs of his body, cannot coalesce; nor can a limitation of a legal estate of inheritance under a power, coalesce with a previous equitable estate of freehold to the same person, although vested in him by the instrument creating the power. And so in every other case which may be put, the construction would be the same as upon a feoffment at common law (*u*). But Lord Hardwicke laid it down as his opinion, that words of regulation or modification of the estate, as the words *equally to be divided* are, and not words of limitation, might have greater latitude given to them in deeds under the statute of uses than in feoffments; and he accordingly decided, that the words *equally to be divided* in a deed operating under the statute, would create a tenancy in common (*x*); which point was afterwards solemnly determined the same way by the court of King's Bench in the year 1753 (*y*). However, the student should be cautious how he extends this doctrine, as it is difficult to put many cases to which it would apply.

But a greater latitude is allowed in *wills* executing powers; for as we have seen, wills executed under powers must receive the same construction as proper wills. It seems indeed once to have been doubted whether a will made in exercise of a power could be con-

(*u*) See Makepeace *v.* Fletcher, 2 Com. 457; Rigden *v.* Vallier, 3 Atk. 731; 2 Ves. 252; Tapner *v.* Merlott, Willes, 177; Stratton *v.* Best, 1 Bro. C. C. 333; Doe *v.* Morgan, 3 Term Rep. 765.

(*x*) Rigden *v.* Vallier, *ubi sup.*

(*y*) Goodtitle *v.* Stokes, 1 Wils. 341; Say. 67.

sidered

sidered as a proper will. In an opinion of Mr. Justice Burnet's, on a case referred to him (*a*), he seemed clearly of opinion that a power executed by will must be construed the same as if executed by deed. He said, addressing himself to the limitations in the will, "For if such a limitation in the deed would be bad, such an appointment by virtue of that deed would be as bad. Nor will it vary the case that such an appointment is expressly allowed to be made by will; for the appointee is not in by the will, but under the deed, and the will is only directory as to the person and estate to be taken under the deed (*b*). Nor is such an appointment a devise within the statute of wills."

But in the Duke of Marlborough *v.* Lord Godolphin (*c*), Lord Hardwicke expressly said, "So if a power is given by deed to appoint lands by will, and the person to whom the power is given makes a will and gives the lands to A and his issue, the law says, that though such appointee takes under the power, yet the execution of the power being by will, it shall receive the same construction as if a devise of lands, viz. an estate tail. So if it had been to A for ever, that would have been an estate in fee. It was never doubted but that the construction of the words would be the same exactly as if he took strictly and properly under the words of a will."

And conformably to this opinion in a later case of an execution of a power by will, Lord Hardwicke held, that altho' the will was not a proper will, yet that the words

(*a*) See 1 Vol. Cas. and Opin. 33. 1 Bulstr. 200; Lemaine's case.
(*b*) 6 Co. 10; Sir Ed. Clere's case; (*c*) 2 Ves. 61.

of it were to have the like construction as if it was a proper will; for, otherwise, there would be a strange confusion in the construction of writings, if they were to have one construction where proper wills, and another where improper: the words therefore of such writings are to receive the same liberal and beneficial construction as the words in a proper will. And he determined an informal limitation to be an estate tail, although clearly it could not have been so construed had it been contained in a deed (*d*).

So in a case in the year 1778, where by a will made in execution of a power, the estate was given to the object of the power and his assigns for his life, with remainder to a trustee and his heirs during the life of the object, in trust to preserve contingent remainders, with remainder after his decease *to his issue in general tail*, with remainders over; Sir Thomas Sewell decreed that the appointee took an estate tail (*e*). We shall again have occasion to touch upon this doctrine, in considering the cases upon excessive executions (*f*).

And here we may notice a point in the case of Clinton *v.* Seymour (*g*), which arose upon a deed. The Duke of Newcastle and his son, the Earl of Lincoln, having a joint power of charging a sum on an estate, directed 16,000*l.* part of it to be raised and paid to them, their executors, administrators, or assigns; and by a deed of even date it was agreed, that if the Earl should survive the Duke, he should apply the money in

(*d*) Southby *v.* Stonehouse, 2 Ves. 610; and see Robinson *v.* Hardcastle, 2 Bro. C. C. 30.

(*e*) Phelp *v.* Hay, MS. Appendix, No. 11; see Coulson *v.* Coulson, 2 Str. 1125.

(*f*) See *post*, sect. 8.

(*g*) 4 Ves. jun. 440.

payment

payment of the Duke's debts, and the residue should go as part of the Duke's personal estate; and if the Duke survived it was to go in the same way, only of course he himself was to make the application. The Duke did survive; and in consideration of 14,900*l.* and natural love and affection, assigned the 16,000*l.* to one of his younger children. It was insisted that the Earl of Lincoln's object was defeated, as he intended the money to be applied only in payment of the Duke's debts, and that the son purchasing the 16,000*l.* was bound to see to the application of the purchase money. But as to the 14,900*l.* Lord Alvanley considered the son a purchaser for a valuable consideration, and not bound to see to the application of the money. The question, he said, then remained as to the sum of 1100*l.* whether that was not appointed in breach of some trust in the Duke. It was a very extraordinary transaction, and all these strange words, he was afraid, were only a circuitous way of saying it was for the Duke himself. However, he thought that the executors of the Duke were the only persons who could call for an application of that sum, on the supposed undertaking of the Duke not to give it gratuitously, but to apply it to the discharge of his debts; he accordingly retained the 1100*l.* with liberty for the parties to apply within twelve months. If no application, to be paid to the appointee.

III. Thirdly, We are to consider *what acts powers in general authorise.* It is clear that a power to make partition of an estate will not authorise a sale or exchange of it; but it has frequently been a question amongst conveyancers, whether the usual power of sale and exchange does not authorise a partition, and several parti-

tions have been made by force of such powers under the direction of gentlemen of eminence. This point underwent considerable discussion on the title which afterwards led to the case of Abel *v.* Heathcote (*a*). The late Mr. Fearne thought, that the power did authorise a partition, on the ground that the partition was in effect an exchange. The power was *to make sale of* or *convey in exchange* the estate for the best, or such other equivalent interest in lands as the trustees should think proper, and for that purpose, to revoke and limit new uses. The case was first heard before the Lords Commissioners Eyre, Ashurst, and Wilson. They all thought that the power was to receive a liberal construction, as its object was to meliorate the estate. Eyre thought, that upon the word *sell,* the trustees should have a power of making partition, because it was in effect to take quite a new estate. And Ashurst and Wilson thought, that whatever power might be derived from the word *sell,* the other words of the power, *convey for an equivalent* were sufficient. They, however ultimately declined to decide the question. Upon the cause coming on before Lord Rosslyn, he determined that the power was well executed, and founded his opinion on its being in effect an exchange, as the consequences and effects of a partition and exchange, as to the interests of the parties are precisely the same.

Nearly the same point was again agitated in the late case of M'Queen and Farquhar (*b*). There, however, the power in terms only authorised a *sale.* Upon the first hearing, Lord Eldon expressed his opinion, that even a power to exchange would not authorise a parti-

(*a*) 4 Bro. C. C. 278, 2 Ves. jun. 98. (*b*) 11 Ves. jun. 467.

tion,

tion, and in delivering judgment he expressed the same opinion more strongly, and said he should rather have been inclined to decide Abel and Heathcote upon the words, "such other equivalent interest in lands," &c. But without infringing upon that case, he determined that a power of sale simply, does not authorise a partition, whatever a power of exchange may do.

Until the question shall receive a further decision, it can scarcely be considered clear, that a power to exchange will authorise a partition. It is at least very doubtful upon what ground Abel and Heathcote was decided, whether upon the power of sale, or upon the power of exchange, and the principle of Lord Eldon's decision is in complete opposition to that of the Judges in Abel *v.* Heathcote. They contended that the power was for the melioration of the estate, and was therefore to receive a liberal construction. Lord Eldon insists, that the terms and limitations of a power must be observed, according to the contract, or the new use will not arise. And it may be observed, that if Abel and Heathcote cannot be defended, on the broad general ground of a partition being authorised by a power of exchange, it certainly cannot be supported by the words, "such other equivalent interest" in lands, &c. For the power did not authorise an exchange, *or* a disposition for any other equivalent interest in lands, but simply an exchange of the settled estate for an equivalent interest in other lands. These, or words to the like effect, must of necessity be expressed or implied in every power of exchange, and cannot, by any licence be cut out and read as authorising a distinct, independent act.

But as Lord Rosslyn has observed, this objection may be obviated where there is a power of sale. The

undivided part of the estate may be sold; the trustees may receive the money, and then lay it out in the purchase of the divided part (*c*); and although the sale is merely fictitious in order to effect the partition, yet it should seem that the transaction cannot be impeached. The same observation applies to an exchange under a power of sale. The estate may be sold to the owner of the estate intended to be taken in exchange, and then the money may be laid out in the purchase of this last estate (1).

It was formerly a very considerable question, whether a tenant for life, with a power of sale and exchange in himself, or to the execution of which his consent was required, could buy the estate himself, or take it in exchange for an estate of his own. As to an exchange, it was insisted that the power meant an act that bore as near a resemblance to a strict legal exchange as possible; and that therefore there must be two different persons to reciprocally exchange, which there could not be where the tenant for life had the power himself. And in regard to the general question, it was doubted whether at least equity would not relieve against the execution of the power. Lord Eldon, although fully aware of the danger attending a purchase of the inheritance by a tenant for life, seems to think that it cannot be impeached on general principles (*d*). A few years ago, how-

(*c*) See 2 Ves. jun. 101; 4 Bro. C. C. 285.

(*d*) See 9 Ves. jun. 52; and 11 Ves. jun. 480; but see ib. 476, 477.

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(1) There is a case now depending in the Court of Chancery, where, under a power of sale, the estate was sold, and the money immediately laid out in the purchase of a rent-charge out of the *same estate*. The bill was filed by a vendor to obtain a specific performance against the purchaser, who objected to the title.

ever,

ever, the doubt was stated as a ground for requiring the aid of Parliament, in a petition for an act to enable an exchange of settled estates with the tenant for life, which it was conceived could not be done under a power of sale and exchange in the settlement. The Chief Baron, and Mr. Baron Hotham, to whom the bill was referred, reported, and submitted it as their opinion, that the doubt which was the cause of petitioning for the bill was not well founded; and therefore, that the bill was unnecessary, and that the passing of such a bill might cause a great prejudice to numerous titles under executions of powers of sale and exchange of a similar kind: and the House of Lords accordingly rejected the bill; in consequence of which many estates of great value have since been purchased, and taken in exchange by tenants for life, under the usual powers of sale and exchange.

Where a power of sale is given, the object certainly is not to turn the land into money so as to increase the income of the tenant for life at the expense of the persons entitled to the inheritance, although every well drawn settlement contains a clause expressing, that until a convenient purchase can be found, the trustees shall lay out the money in the funds at interest. Lord Eldon addressing himself to the usual words in powers of sale, that the trustees may sell for such price as shall appear to them to be reasonable, observes, that that expression must be construed at least in a question between the trustees and the *cestuis que trust*, after they have with due diligence examined. The object of the sale must be to invest the money in the purchase of another estate to be settled to the same uses; *and they are not to be satisfied with probability upon that*; but it ought to be with reference to

an object at that time supposed practicable, or at least the court would expect some strong purpose of family prudence justifying the conversion, if it is likely to continue money (*e*).

The conclusion of the sentence shows, that Lord Eldon is not to be understood to mean, that the estate cannot, under any circumstances, be sold, unless the trustees have another estate in direct view. The usual direction that until a convenient purchase can be found, the money shall be laid out at interest, directly negatives that construction of the power, and many proper reasons frequently occur to induce trustees to sell the estate, although they have not an immediate prospect of purchasing another—as an advantageous offer, &c. And certainly where a sound discretion has been exercised, equity could not affect the trustees as for a breach of trust.

But to return.—A power to sell and raise a sum of money, implies, it seems, a power to mortgage, which is a conditional sale (*f*); and a power generally "to raise a sum" out of an estate, enables a sale of it (*g*). But where a power is given to raise money by sale or mortgage, if the parties intend that a sale may be made after a mortgage in order to pay it off, the intention should be clearly expressed, as it is doubtful whether, if a mortgage be first made, the power is not wholly exhausted, so that a sale cannot afterwards be made to exonerate the estate; and it is clear, that in a case of this kind the *mortgagee* cannot require a sale even if the power authorise a sale, for he is no object of the power, further than as that power enabled the donee to make him

(*e*) 10 Ves. jun. 309.
(*f*) Mills *v.* Banks, 3 P. Wms. 9.
(*g*) Wareham *v.* Brown, 2 Vern. 153.

a good mortgage. When he has that, he is in the ordinary situation of a mortgagee. He has all the remedies, but only the remedies of a mortgagee (*h*).

Where a power of charging is given by an instrument in which different funds are comprised, and the power is not expressly confined to one fund in particular, the question, whether the power embraces both funds or only one of them, must of course depend upon the construction of the whole instrument, and it is obviously impossible to lay down any general rule on the subject. But it should seem, that where a person has an absolute interest in trust given to him in one fund, and not such an interest in the other, and the settlor of the two funds gives him a general power of charging, the power shall relate to that fund only in which the donee has an absolute interest (*k*).

A power to charge land with a particular sum enables a charge of that sum, and the interest besides, for the intention is to charge the estate with the money, and that of course carries interest; and no one would lend such sum on such security if the law were otherwise (*l*).

But where a man, having a power to charge an estate with 2000*l.* *after the death of his wife,* gave 1000*l.* to his wife, payable, with interest *from three months after his death*; Lord Hardwicke held, that the gift of this 1000*l.* was an execution of the power, although

(*h*) Palk *v.* Clinton, 12 Ves. jun. 48; but as to the principal question, see Omerod *v.* Hardman, 5 Ves. jun. 722.

(*k*) See Doe *v.* Milborne, 2 Term Rep. 721.

(*l*) Lord Kilmurry *v.* Geery, 2 Salk. 538; Evelyn *v.* Evelyn, 2 P. Wms. 591; Boycot *v.* Cotton, 1 Atk. 552; Hall *v.* Carter, 2 Atk. 358; and see Lewis *v.* Freke, 2 Ves. jun. 507; Sitwell *v.* Barnard, 6 Ves. jun. 520.

there

there was a mistake as to the time it would be raised. Then it was insisted, that as the widow had 1000*l.* left her, *with interest,* [and the principal could not be paid at the time intended] the interest should be made good till it amounted to 2000*l.* which he had power to raise. But Lord Hardwicke determined that the interest should not be made good out of the power, for that was to charge the estate with a principal sum of 2000*l* (*m*).

(*m*) Probert *v.* Clifford, 1 Atk. 440.

SECTION III.

WHERE AN EXCLUSIVE APPOINTMENT IS AUTHORISED.

WHERE it is intended to give a power of appointing a fund to several objects, or to any of them exclusively, the power should run thus: to all and every, or such one or more exclusively of the other or others of the objects as the donee shall appoint; and in the common case of a power to appoint to children of the marriage, or their issue, it may run thus, providing for every event, to all and every, or such one or more, exclusively of the other or others of the children, *or* to all and every, or such one or more exclusively of the other or others of the issue of the children, *or both,* to all and every, or such one or more exclusively of the other or others of the children, *and* to all and every, or such one or more exclusively of the other or others of the issue as the donee shall appoint.

But we are now to enquire in what cases an exclusive appointment is authorised, although these precise technical words are not used; and first, as to the cases where an exclusive appointment is *not* authorised.

I. Under a power to appoint "to all and every the child and children" (*a*), or "unto and among several objects," every one must have a share (*b*). So even a power of

(*a*) Pocklington *v.* Bayne, 1 Bro. C. C. 450.

(*b*) Malim *v.* Keighley, 2 Ves. jun. 533; and see Maddison *v.* Andrew, 1 Ves. 57; Baker *v.* Barrett, 2 Freem. 199, cited.

disposal

disposal, "unto and amongst *such* children begotten between us, and in such proportion" as the wife shall appoint, compels a distribution amongst all the children, no child can be excluded (*c*). And in a late case (*d*), Lord Alvanley held, that a power to appoint "amongst the children as the donee shall think proper," did not authorise an exclusive appointment. He treated the word "amongst," as equivalent to "all and every," which words are mandatory, that each shall have a share (*e*). And in an early case (*f*), upon a gift to the wife, "upon trust and confidence that she would not dispose thereof, but for the benefit of her children," it was determined that no child could be excluded. But,

II. On the other hand, powers to appoint "to such of my children as my wife shall think fit (*g*)," "to one or more of my children as my wife shall think fit (*h*), ' "to be at my wife's disposal, provided it be to any of my children (*i*)," "amongst all or such of my children (*k*)," "to and amongst such of my relations in such parts, shares and proportions (*l*)," (1) have been held to enable the do-

(*c*) Alexander *v.* Alexander, 2 Ves 640.
(*d*) Kemp *v.* Kemp, 5 Ves. jun. 849.
(*e*) Menzey *v.* Walker, For. 72.
(*f*) Gibson *v.* Kinven, 1 Vern. 66.
(*g*) Liefe *v.* Saltingstone, 1 Mod. 189; and see 5 Ves. jun. 857; Austin *v.* Austin, For. 74, cited.
(*h*) Thomas *v.* Thomas, 2 Vern. 513.
(*i*) Tomlinson *v.* Dighton, 1 P. Wms. 149.
(*k*) Macey *v.* Shurmer, 1 Atk. 389.
(*l*) Spring *v.* Biles, 1 Term Rep. 435, n.

(1) In determining this case, the court appears to have placed some stress on the power being for the benefit of *relations*. It seems, however, that the case must have received the same construction had the power been to appoint the *children*.

nees

nees to appoint exclusively to any of the objects. So where the power was to appoint unto, and amongst *all* such child or children of A in such parts, shares, and proportions, &c. as B should choose, it was holden to authorise an exclusive appointment, although it was insisted that upon the word *all* none could be excluded; but the Chancellor said, that the fault of the plaintiff's argument was, that they stopped at the word "*all.*" They must he added, go on and finish the sentence, and then it was, all such child or children as he shall appoint (*m*). And this construction had previously been established by a case more difficult to manage. Under a marriage settlement, a real estate was settled to the use of such child *and* children, and for such estate and estates and purposes as the husband should appoint, and in default of appointment, the estate was limited to the use of *all and every the child and children* of the marriage in fee. The father made an exclusive appointment. Against the power it was forcibly argued by the present Chief Justice of B. R. then at the bar, that the grammatical sense and construction of the words plainly imported, that the appointment must be *among* the children, to *such child,* if only one, and to *such children,* if more than one, that "*and*" could not be satisfied without giving a share to each, that the words *such child,* and *such estate* were only added to shew, that even if there were only one child, the father had a discretion as to the estate to be given to him, and that the words in default of appointment, "to all and every the child and children," must mean the same as "child and children" in the former part, and they shewed that the

(*m*) Wollen. *v.* Tanner, 5 Ves. jun. 218.

power

power must be executed in favour of *every one* of the children. But the court construed the power to be exclusive, and read "or" for "and." Ashurst J. considered the case stronger, as the subject was realty and not personalty, and that, if it had been intended that *all* should have derived some benefit, they would have said, "among them," and they would not have used the word "child" in the singular number, which could only have been added for the purpose of giving a power to appoint to *one only;* and Buller, J. thought the case of Spring *v.* Biles stronger than the present. There the power was "to and among such of my relations, &c. in such parts, shares, and *proportions*," &c. which imported that a division was intended. But in the present case, the words "parts, shares, and proportions," were not used (1) (*n*).

In many cases an exclusive appointment may be authorised by the apparent intention of the donor, altho' no words of exclusion are expressly used.

Thus in the case of Bevil *v.* Rich (*o*), the testator gave all the rest of his estate to A B "on trust to give my children and grandchildren *according to their demerits.*" A B gave the estate to one, omitting the rest. Lord Nottingham refused to set aside the appointment, as the children were to come in by the act of the devisee,

(*n*) Swift *v.* Gregson, 1 Term Rep. 432; and soe Kenworthy *v.* Bate, 6 Ves. jun. 793.

(*o*) 1 Cha. Ca. 309.

(1) These words, however, can scarcely be considered as important in any case with reference to the question under discussion, as they are inserted to meet the case of an appointment to two or more.

and

and he was to give or distribute according to their demerits; therefore he was judge.

So in the case of Burrell and Burrell (*p*), where the property was given by will to the testator's wife, "to the end she might give his children such fortunes as she should think proper, or they best deserve, to whom he charged his sons and daughters to be dutiful and obedient, and loving and affectionate to each other." Lord Camden appears to have determined that the wife had a power to appoint to any of the children exclusively of the others. Lord Alvanley has observed, that he would not say what his own opinion would have been on that case. He was willing to submit to that of Lord Camden upon such a doubtful question, being perfectly satisfied, that in criticising on the words "to and amongst," &c. the court goes against the intention (*q*).

Again, in a case where a testator bequeathed a sum to his executor, "to be distributed *amongst his poor relations, or such other objects of charity*" as the testator should mention in private instructions: no instructions were left, and it was not necessary to decide the point; but Lord Redesdale said, that the testator's design was to give to them as objects of charity, and not merely as relations; and he expressed his opinion, that the executors had a discretionary power of distribution, and need not include all the testator's poor relations (*r*).

The word "such" standing unexplained, authorises, as we have seen, an exclusive appointment; but that

(*p*) Ambl. 660.
(*q*) See 5 Ves. jun. 860; and see ib. 863.
(*r*) Mahon *v.* Savage, 1 Sch. and Lef. 111.

word

word is not unfrequently governed by a preceding clause, so as to mean a particular class or description of issue, all of whom must be provided for. And as a power to appoint exclusively may be collected by implication, where an authority in express words is wanting, according to the cases just dismissed, so an express power in terms to appoint exclusively may be construed to be merely a power of distribution, in order to effectuate the clear intention of the parties. Both these points were determined by Lord Hardwicke, in the case of Burleigh *v.* Pearson (*s*).

Burleigh, previous to his marriage, by a deed of trust, declared the uses of a copyhold estate belonging to his wife; reciting, that to make a provision for the maintenance and preferment of *such younger children which they should leave unmarried,* and unadvanced or otherwise provided for at their deaths; and for raising such sum as they should think requisite for the fortunes and preferments of *such younger children,* the trustees should raise 1000*l.* to pay the same to *such younger children,* in such manner and proportion as they should appoint by writing; and in default of appointment by both, then to the said younger children, *or some of them,* as the survivor should appoint by writing or will; in default of appointment, equally to be divided among them. The question was, whether an exclusive appointment was authorised. Lord Hardwicke said, that the deed by which this trust was created was certainly very inaccurately penned, but a reasonable construction must be made; and that from the intent of the parties

(*s*) 1 Ves. 281; and see Alexander *v.* Alexander, 2 Ves. 640.

fully

fully declared in the beginning of the deed, which was the leading clause; and therefore other doubtful words, if any, ought be controuled and construed by that plain declaration of the intent, which was to make a provision for those younger children who should be left unmarried, &c. to which description the word *such* was plainly relative. "*And,*" after unmarried, must be construed "*or;*" and the negative must run through the whole, otherwise it was absurd; for they certainly meant *unprovided for;* and then a child, though married, if not advanced or otherwise provided for, would be the object of the power: and in this sense it was used in the will. Then, *such,* he added, referred to the description before the governing clause through the whole, and did not mean a general power to appoint to one or two, for all must have some. The contrary construction would overturn the intent; impowering to give the whole to a child even provided for, and to leave the rest unprovided. But the most doubtful part was from the words *or some:* but it would be strange to construe this deed so as to leave greater power to disinherit in the survivor, than was given jointly, especially if the husband survived, as happened, when it was the wife's estate. The addition of *some* must mean some of those under the qualifications before described, in the same manner as *such.* Another inaccuracy occurred afterwards in case of no appointment; for it must not be construed to be divided among all, as well provided for as not, but meant the said younger children, viz. unprovided. And he accordingly set aside the execution of the power, because some of the objects were excluded.

In the cases hitherto considered, it is clear that the party may appoint to all the objects of the power, and the doubt is, whether he can exclude any, but a power may authorise an appointment to one of many objects, and not an appointment to all: thus in a case where the estate was given by will, "to one of the sons of A as B shall direct;" Lord Alvanley said, that if he had made a disposition to all, it would have been void. He was obliged to select one. He had power, if he thought fit, to give it to any one son, and if he had gone beyond that, it would not have been well executed (*p*).

(*p*) Brown *v.* Higgs. 4 Ves. jun. 708, see page 717.

SECTION IV.

WHAT IS DEEMED AN ILLUSORY APPOINTMENT.

HAVING once ascertained that none of the objects of any given power can be excluded from participating in the fund, the question at once arises, what share must each have? At law, it is clear, that any share, however nominal or illusory, will satisfy the terms of the power. The gift of a ring (*a*), or a shilling (*b*), will be a good legal execution of the power; whereas in equity five shillings (*c*), ten guineas (*d*), or any other sum merely illusory with reference to the amount of the fund and the number of the objects amongst whom it is to be distributed, will be void. We have already had occasion to consider how far this distinction between the legal and equitable execution of such a power can be defended upon principle (*e*).

This equity was inforced at a very early period, and was frequently administered (*f*); nor has it been less the subject of discussion in modern times (g). It ex-

(*a*) See 1 Vern. 67.

(*b*) 1 Term Rep. 438 n. and see 4 Ves. jun. 785.

(*c*) Gibson *v.* Kinven, 1 Vern. 66.

(*d*) Vanderzee *v.* Aclom, 4 Ves. jun. 771.

(*e*) *Vide supra*, ch. 7. sect. 2.

(*f*) See Wall *v.* Thurborne, 1 Ver. 335, 414; Cragrave *v.* Perrost, cited, ib. 355; see 2 Cha. Ca. 228; and see 9 Ves. jun. 395. In Civil *v.* Rich, 1 Cha. Ca. 310, Lord Nottingham referred to this case, as expressly confined *to the widowhood of the wife*; Astry *v.* Astry, Prec. Cha. 256. As to Sweetnam *v.* Woolaston, cited 1 Vern. 356; see 5 Ves. jun. 858.

(*g*) See Menzey *v.* Walker, For. 72; but note, there one child was totally excluded; Maddison *v.* Andrew, 1 Ves. 57; Coleman *v.* Seymour, ib. 211.

tends as well to real as to personal estate (*h*); and the only difficulty is to ascertain what proportion shall in every particular case be deemed illusory. In Wilson and Piggot, the proportion given to one of four children amounted only to one sixteenth of the whole fund, and Lord Alvanley held it to be good (*i*), although it was one fourth less than an equal proportion. In Alexander *v.* Alexander (*k*), the proportion given was only a sixtieth part of the fund to one of five children, and the point was not raised. In Kemp *v.* Kemp (*l*), Lord Alvanley repeated the desire which he had often expressed, to get out of the rule altogether, and lamented that equity had not followed the rule of law; but he was compelled, against his inclination, to hold the appointment in that case illusory. The fund amounted to nearly 1900*l.* There were three objects: to one 50*l.* was given; to another 10*l.* and the residue to the other. The first, therefore, had only a thirty-eighth share, and the second only a one hundred and ninetieth share of the entire fund, when, upon an equal division, each would have been entitled to a third. Lord Alvanley, in delivering judgment, said, that he should hardly have conceived that 50*l.* could be considered a substantial part, but that the sum of 10*l.* was evidently meant to be no gift, the party merely supposing himself to be under the necessity of giving something to each.

(*h*) Pocklington *v.* Bayne, 1 Bro. C. C. 450.

(*i*) 2 Ves. jun. 351. In Vanderzee *v.* Aclom, 4 Ves. jun. 771, the amount of the fund is not stated; and see Spencer *v.* Spencer, 5 Ves. jun. 362.

(*k*) 2 Ves. 640; but see 9 Ves. jun. 392, where it is stated from the register's book that the child did not claim more.

(*l*) 5 Ves. jun. 849.

Thus

Thus the doctrine stood till the late case of Butcher v. Butcher (*m*), in which the Master of the Rolls, after delivering the most luminous and argumentative judgment perhaps in the books, held, that as no case had been found in which a sum of the amount in the case before him had been declared illusory, there was no ground upon which he thought himself justified in determining that this was an invalid appointment. He summed up the difficulties attending this branch of equitable jurisdiction in a few words. To say, under such a power an illusory share must not be given, or that a substantial share must be given, is rather to raise a question than establish a rule. What is an illusory share, and what is a substantial share? Is it to be judged of upon a mere statement of the sum given, without reference to the amount of the fortune which is the subject of the power? If so, what is the sum that must be given to exclude the interference of the court? What is the limit of amount at which it ceases to be illusory and begins to be substantial? If it is to be considered with reference to the amount of the fortune, what is the proportion, either of the whole, or of the share, that would belong to each upon an equal division?

In the case of Butcher and Butcher there were nine persons, and the fund amounted to about 17,000*l*. To some of the children 200*l*. 3 per cents only was given; so that reckoning the stock at even 70 per cent. the share did not exceed a hundred and twenty-second part of the fund. In the next case which came before the Master of the Rolls, the fund was 2500*l*. South Sea

(*m*) 9 Ves. jun. 382.

annuities, and there were only two objects of the power; to one 100*l.* stock was given, and the residue to the other. The first therefore had only a twenty-fifth share; and the Master of the Rolls, referring to his former decision, held the appointment not illusory (*n*). Another case arose shortly afterwards, in which the fund was 2500*l.* There were five (1) objects of the power. To some the donee of the power gave only a share which amounted to 33*l.* 6*s.* 8*d.* each, when, upon an equal division, they would have been entitled to 500*l.* each. The Master of the Rolls said, that he adhered to the rule he laid down in Butcher *v.* Butcher; that he would go as far as he was bound by authority, and no farther. Shew me, he added, a case in which a specific sum, or an equal proportion of what would be the share of each object of the appointment upon an equal division, has been held to be illusory, and I will in the same case make the same decision. And, after shewing that Kemp *v.* Kemp was an authority only as to the 10*l.* and did not turn upon the 50*l.* he determined that the appointment was good, as the sum of 33*l.* 6*s.* 8*d.* was not the same specific sum, or the same proportion of the share of each child, upon an equal division, that had been in any former case held to be illusory (*o*).

In the foregoing case, with reference to the whole fund, the share given was only equal to about a seventy-

(*n*) Bax. *v.* Whitbread, 10 Ves. jun. 31.

(*o*) Mocatta *v.* Lousada, 12 Ves. jun. 123.

(1) Although the power extended to the issue of the children, yet it also seems that they, the issue, were considered as standing in the place of their parent, and there were only five children; *sed qu.*

fifth

fifth of it; and in another case, which occurred a month afterwards, and is the last case on this subject, the disproportion was still greater. The fund amounted to about 7100*l.* and there were nine objects of the power, seven of whom had only about 71*l.* a piece given to them. The point was given up in argument; and the Master of the Rolls thought that there was nothing in an objection taken that there might be more children, there was so little probability, under the circumstances, that the shares would ever be reduced below the standard under which he had said he should consider himself bound by the authorities (*p*).

The result of the authorities, then, is rather a negative than an affirmative rule. Lord Alvanley has determined, that where a party is, in default of appointment, to take a third share, a gift of a hundred and ninetieth share to him is illusory; and here at length the line appears to have been drawn; so that any share which squared by this rule would exceed that in amount, is not illusory. As the rule is now established, some of the objects may in effect be excluded; therefore, where it is intended that a party shall have a power to divide the fund amongst several objects in substantial proportions according to his discretion, but shall not be at liberty to give merely a nominal share to any; the smallest sum which the person creating the power would wish each of the objects in any event to have, should be named; and it should be expressly declared, that the donee of the power shall not appoint a less sum to any one of the objects.

(*p*) Dyke *v.* Sylvester, 12 Ves. jun. 126.

But as we shall hereafter see what is not appointed or is ill appointed, goes as in default of appointment, and where the fund is given by the instrument creating the power to the objects in default of appointment, the dying without any appointment as to a part, is considered equal to an actual appointment; and therefore a sufficient share being permitted to descend, will be deemed tantamount to an appointment, so as to prevent any question of illusion (*z*).

And if an appointment be made of part of the fund, excluding some of the objects, but leaving a share not illusory to descend, and afterwards an appointment be made of the residue, wholly excluding or giving an illusory share to some, the last appointment only shall be void, so that the residue may descend and uphold the former appointment. If a contrary rule were established, an appointment leaving a share not illusory to descend, would be good at first, but become bad afterwards (*a*).

And although an appointment abstractedly taken be illusory, yet it may be justified by circumstances, and equity will not relieve against it. Formerly it was considered, that where but a trifle was given, yet if the child by misbehaviour deserved it, the court would not vary the appointment (*b*); but at the present day, the conduct of the objects of the power cannot be taken into consideration (*c*).

In Boyle *v.* the Bishop of Peterborough, Lord Thurlow laid it down, that where gross inequality is accounted for, and by the situation of the children is rendered

(*z*) Wilson *v.* Piggott, 2 Ves. jun. 351.

(*a*) Wilson *v.* Piggott, *ubi sup.*

(*b*) Maddison *v.* Andrew, 1Ves .57,

(*c*) Kemp *v.* Kemp, 5 Ves. jun. 855.

humane,

humane, and wise, and discreet, the court will not call it illusory (*d*). And where a father having advanced a child upon marriage, recited that as a reason for giving her a small share, it was held not to be illusory (*e*). For the ground of interference in these cases is fraud, and in such case the *child* would be guilty of a fraud in attempting to set aside the appointment, the parent perhaps having advanced more on that account; the answer would be, he had given that child a substantive share, who therefore could not complain of the difference (*f*). Lord Alvanley expressed his opinion, that perhaps if a sufficient reason *could be proved* between parent and child, the court would apply the rule; but it must be proof, he said, that leaves no doubt whatsoever. And in speaking thus, he adverted to extrinsic proof where no statement appears upon the face of the appointment (*g*). But it seems that in these cases the provision must move from the person intrusted with the power of appointment (*h*), although in one case Lord Alvanley expressed an opinion, that a small share might be given where there is an actual provision made for some, *even where it does not move from the person executing the power*. The power of distribution, he said, was given in order that there might be an inequality if necessary. It was therefore, he added, nothing but a trust in the party to discriminate how much each ought to have, under every circumstance

(*d*) 1 Ves. jun. 299; 3 Bro. C. C. 243.

(*e*) Bristow *v.* Warde, 2 Ves. jun. 366; and see Smith *v.* Lord Camelford, ib. 698; Vanderzee *v.* Aclom, 4 Ves. jun. 771; Long *v.* Long, 5 Ves. jun. 445; Spencer *v.* Spencer, 5 Ves. jun. 362.

(*f*) See 5 Ves. jun. 368.

(*g*) Spencer *v.* Spencer; *ubi sup.*

(*h*) Mocatta *v.* Lousada, 11 Ves. jun. 123.

that

that ought fairly to enter into his consideration, and with a view of the object of the power, that each of them should receive a provision. If that was satisfied *aliunde*, it had its object (*i*). It is however clear, that the provision must not move from the person *creating* the power (*k*).

If the objects have agreed to abide by the intention and will of the donee of the power, they cannot set aside even an illusory appointment (*l*) (1).

Where the donee of the power is a mere stranger, and a trustee of it, upon a bill being filed before an appointment, the court always decrees an equal distribution of the fund amongst the objects; and although the trustee of the power might have excluded some, the court cannot (*m*). And the same rule prevails where the appointment is set aside as illusory, and there is no gift in default of appointment (*n*). In some early cases,

(*i*) Vanderzee *v.* Aclom, 4 Ves. jun. 785, *sed qu.*
(*k*) Kemp *v.* Kemp, 5 Ves. jun 861.
(*l*) Pawlet *v.* Pawlet, 1 Wils. 224.
(*m*) Kemp *v.* Kemp, 5 Ves. jun. 849; Longmore *v.* Broom, 7 Ves. jun. 124.
(*n*) Gibson *v.* Kinven, 1 Vern. 66.

(1) This case, which is very long, did not decide any thing. The Earl made provisions by his will for all his children, and the decree is prefaced by this declaration: that the plaintiff having by his bill and now in court, expressly submitted to be bound by the intention of his father, the late Earl, in his deed of appointment and will, according to the true construction thereof, and all the defendants, the other children of the late Earl, having, by their answers, or now by their counsel at the bar, submitted to take, according to the true intention of the said Earl, and all the said parties disclaiming to take advantage of any defect in point of law *or equity* in the execution of the said Earl's power by the deed of appointment; his Lordship declared, &c. Poulett *v.* Earl Poulett, Reg. Lib. B. fol. 582

the court exercised a dangerous discretion, as by giving the whole (*o*), or a double share of the estate to the heir at law (*p*). ; but this power the court has of late very properly disclaimed (*q*), and a discretionary power in a parent, is never executed by the court (*r*) ; nor is it controlled except on the ground of fraud, as in the case of an illusory appointment.

(*o*) Clarke *v.* Turner, 2 Freem. 198; and Mosely *v.* Mosely, cited, ib.; see Finch, 53.

(*p*) Warburton *v.* Warburton, 2 Vern. 420; 1 Bro. P. C. 34; and see Carr *v.* Bedford, 2 Cha. Rep. 77.

(*q*) See 5 Ves. jun. 859; and see Alexander *v.* Alexander, 2 Ves. 640.

(*r*) Maddison *v.* Andrew, 1 Ves. 57.

SECT.

SECTION V.

OF THE CONSTRUCTION OF A POWER TO APPOINT TO CHILDREN.

It is upon the power of which I am now to treat, that by far the greater proportion of cases arise. As we have already discussed, perhaps sufficiently, the general doctrine in regard to the estates which may be created under powers, I shall here only consider, 1. To whom an appointment may be made under a power to appoint to children. And 2. In what manner the fund may be settled upon them, merely premising that an indefinite power in words may, upon the whole instrument taken together, be confined to children (*a*). And,

I. First then, It is now perfectly established that a power to appoint to children will not authorise an appointment to grandchildren (*b*).

In the case of Doe on the demise of the Duke of Devonshire *v.* Lord George Cavendish, a contrary opinion was in effect delivered, although it was pronounced on the particular circumstances of the case. The case was shortly this, Lady Burlington devised freehold estates to the use of the Duke of Devonshire, for life, remainder to trustees, to preserve remainder "to the use of such his

(*a*) Bristow *v.* Warde, *vide supra*, p. 376.

(*b*) Alexander *v.* Alexander, 2 Ves. 640; Bristow *v.* Warde, 2 Ves. jun. 336; Whistler *v.* Webster, ib. 367; Smith *v.* Lord Camelford, ib. 698; Crompe *v.* Barrow, 4 Ves. jun. 681; Adams *v.* Adams, Cowp. 651; Brudenell *v.* Elwes, 1 East, 442; 7 Ves. jun. 382; Butcher *v.* Butcher, 9 Ves. jun. 382.

child

child or children by his late wife for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisoes, conditions, restrictions or limitations as he should appoint;" and in default of appointment, to all the child or children of the Duke by his wife as tenants in common in tail, with cross remainders between them in tail, with remainder to the Duke in fee. He exercised the power by limiting the estate to his two younger sons for life, with remainder to their issue in strict settlement, with a power to make jointures, &c. In the view that was taken of the case, it was not necessary to decide the point, but the court gave an extrajudicial opinion upon it (*c*). They said there were three grounds from which they were of opinion that this was a good execution: 1. From the subject matter of the power; 2. From the limitations over for want of appointment; 3 From the words in which the power was created. 1st, This was not money, nor to be turned into money, nor portions. It was a limitation of a family estate, how it should go after her death. She considered how it should go, being determined that it should go amongst grandchildren. Suppose she had only said, at the time of making her will, that she meant it to go to the grandchildren, it must have been enquired, whether absolutely, or in strict settlement: if so, her answer must have been, "in strict settlement." There are two kinds of settlement, one by which the issue of the person to whom the first limitation is made shall certainly take, by giving the first taker only an estate for life, the other by creating an estate tail in the first instance. But then there is a trick

(*c*) 4 Term Rep. 744, n.

in

in law, by which, when the issue arrive at twenty-one, the entail may be barred. If this had been represented to Lady Burlington, her answer would have been, that she was sorry for it, as it might be a mean of defeating her purpose: but then it would be answered to that again, that there was a trick against that, to make a strict settlement. That was meant; but to guard against all events, she said, "I will put the father in my place, and give him authority, if he choose to execute it." If the words "in strict settlement" had been used, no body could have doubted her meaning. Now all the words in the language, except those, are used to carry this power as far as possible, and to shew that she meant an appointment in strict settlement. Whatever he might do with his own estate, he might do with this; that was her intention, only that the children were the objects. What is the use of powers? It implies a strict settlement, with power to make jointures, leases, and raise portions.

Upon the foregoing decision it need only be remarked, that as to the first ground, it can at most only go in aid of the construction upon the words of the power itself: that the second ground bears against the construction of the court, as the estate was in default of appointment, given amongst the children in tail, so that they might acquire the fee, and their issue could only take through them, and not as purchasers: and that in regard to the 3d ground, the objects were the child or children, and the general words are merely those which are commonly inserted by conveyancers with a view to the interests to be given to the objects designated and not with an intent to extend the power by implication to objects not named in it, nor will the words

bear

bear a contrary construction consistently with the decided cases (*d*).

The same point arose in Griffith *v.* Harrison (*e*). By one codicil an estate, part freehold and part copyhold, was given to his wife for life, and after her decease, "to such *child or children* of him the devisor as she should judge most proper to bequeath the same to." By a later codicil he gave the estate to his wife for life, and impowered her to devise the same to any one or more of his *child or children*, in such manner, share, and proportion as she should appoint, but *so as the said estate should not be divided, but transmitted whole and entire to his heirs.* And he gave the reversion of an estate adjoining to the other in like manner, and declared that the two estates should be considered *as one estate, and be transmitted entire to his family.*. In default of appointment, he gave the estate to his own right heirs. The widow appointed the estate to her eldest son for life, remainder to trustees, to preserve remainder to his children in strict settlement in the usual way, with like limitations to her other children and their issue. The court of King's Bench were equally divided in opinion(*f*): Lord Kenyon and Mr. Justice Grose were of opinion that the children were the only objects, and that the whole execution of the power must be exhausted upon them. The execution which the wife had attempted took in persons who were not children of the testator, and affected to make them purchasers, and was not only not warranted by the power, but might give a descendable quality to the estate to persons out of the testator's

(*d*) See this case more fully observed upon in Pow. n. to Fearne's Ex. Dev. p. 349. (*e*) 3 Bro. C. C. 310. (*f*) 4 Term Rep. 737.

views,

views, viz. to the heirs *ex parte materna* of the children of the sons, and *ex parte paterna* of the children of the daughters. But they thought that in favour of the general intention the children might be held to take estates tail.

On the other hand Ashurst and Buller (who were Judges of B. R. when the Duke of Devon's case was decided) certified that the first son took for life only. They prefaced their opinion with a declaration, that the intention of the person creating the power, is to be the guide in the construction of it, and that a settlement upon a child for life, with remainder to his children in strict settlement, is in common parlance a settlement on the child. They then criticised on the words of the power, which they thought tantamount to a power to limit the estate "in strict settlement," and they relied on the Duke of Devonshire's case as in point. But if a strict settlement was not authorised then, as the estate was to be transmitted entire, they thought that the only way of making the different parts of the power consistent, was to consider the word "heirs" as applicable only to more remote descendants than the children; and to confine the wife's power of appointment to the children during their lives only, in which case after their deaths, the estate would go entire to the right heir of the testator.

If the rule attempted to be established in the Duke of Devonshire's case, and by Ashurst and Buller in the last case were to prevail, it would certainly amount to this, that every power of appointment to *children*, in which the general words *manner, share, proportion*, &c. are thrown in, extends to grandchildren. Now it is incontrovertibly settled, that grandchildren are not objects

jects within a bare power to appoint to children, and it would be highly mischievous if this broad rule were to be cut down by a minute inquiry in every case, whether there are not words in the power tantamount to "strict settlement," so as to embrace grandchildren according to the supposed *intention*.

But we may fairly consider the principles upon which the extrajudicial opinion delivered in the Duke of Devonshire's case was founded as completely over-ruled. They received a severe shock from the certificate of Lord Kenyon and Mr. Justice Grose in Griffith and Harrison. And in a subsequent case, which it is quite impossible to distinguish from the Duke of Devonshire's case, the court of King's Bench, and afterwards Lord Eldon, held, that the power did not authorise a limitation to grandchildren, notwithstanding that the usual words "in such parts or proportions, and for such estate and estates, and with and under such charges, provisions, conditions, and limitations," were inserted in the power (*g*). In a case which arose since Lord Kenyon's death, Mr. Justice Lawrence observed, that the Duke of Devonshire's case was one that would not rule any other, at least not exactly similar. That he had heard Lord Kenyon express that opinion of it (*h*); and neither Lord Thurlow (*i*) nor Lord Alvanley appears to have considered the case as of much authority (*k*).

If the case of Brudenell *v.* Elwes is to be treated as a binding authority, a power in the precise words of that in the Duke of Devonshire's case must now be held

(*g*) Brudenell *v.* Elwes, 1 East, 442; 7 Ves. jun. 382.
(*h*) See 2 East, 381 n.
(*i*) Lowson *v.* Lowson, 2 Bro. C. C. 26, cited; and see ib. 29.
(*k*) See 4 Ves. jun. 684.

to extend to children only. It would be idle to attempt to distinguish the cases: the powers are nearly word for word the same:

Duke of Devonshire's case.

"To the use of such his child or children by Charlotte Lady Cavendish, his late wife, for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisoes, conditions, restrictions, or limitations as he shall, by deed, &c. nominate, direct, limit, or appoint."

Brudenell v. *Elwes.*

"To the use of all or any the child or children of the body of J. C. on the body of Louisa his wife, lawfully begotten and to be begotten, in such parts or proportions, and for such estate and estates, and with and under such charges, provisions, conditions, and limitations, as they should, by any deed, &c. direct, limit, or appoint."

In the case of Mallison v. Andrews, a power was given to a woman to dispose by deed or will of 1300*l.* to such of her children, in such manner and form, *and to such uses and purposes* as she should appoint. She gave a part to one child for life, and after her decease the principal to be divided among her children. And under the very full words of this power the appointment was held to be well made (*l*) (1).

(*l*) 2 Bro. C. C. 26. n; Chan. Hil. 1782.

But

(1) Most of the cases in the notes to Brown are inaccurately reported. This case is introduced as a note of a case cited in the argument of Robinson v. Hardcastle; but it is evident that the case intended to be cited was Maddison v. Andrew, in 1 Ves. 57; and there appears to be reason to suspect, from the striking similarity of the names, that the case of Mallison v. Andrews is merely an inaccurate statement of the former, or that that case has been confounded with some other. I could not discover the case referred to by Brown in the Register's book. There is a case in 1782, Mallison v. Nesbitt, but that turned upon a very different

But, even full as these words were, yet, unless the words "and to such uses and purposes," were considered as an independent clause, authorising an appointment even to strangers, which perhaps can hardly be contended, the case it should seem cannot stand, consistently with the later determinations.

In Alexander *v.* Alexander, after giving a power of appointment in favour of his children to his wife, the testator directed that if she should think fit to apply in her lifetime any part of the fund for their better advancement in marriage, or otherwise in the world, then the trustees should pay such part of it, *for the benefit of such children* as his wife should appoint. Sir Thomas Clarke thought that this power would have enabled the mother, for better advancement in marriage, to make *a strict settlement* (*m*).

Where a child dies without any appointment having been made to him, no part can be appointed to his executor or administrator (*n*); and indeed, as we have seen, an appointment may be made to the surviving children or child, so as to exclude the representatives of the deceased child from taking any share under a gift in default of appointment (*o*).

(*m*) 2 Ves. 640. In citing this case, Mr. Justice Buller appears to have overlooked this power; see 2 Term Rep. 253.

(*n*) Maddison *v.* Andrew, 1 Ves. 57.

(*o*) Boyle *v.* the Bishop of Peterborough, 1 Ves. jun. 299.

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ferent question. Reg. Lib. B. 1781, fol. 388. There is also a case of Mallison *v.* Robinson, *Archdale*, and others, which was a petition by a tenant for life under a will, and the question could not arise in that case, Reg. Lib. B. 1782, fol. 65.

But it is settled, that in equity a valid appointment may be made to persons not objects of the power, with the approbation of the real object of the power. Therefore, if upon the marriage of a child, the parent, by the marriage settlement, under a power to appoint to children appoint to the issue of the marriage, the appointment would be supported in equity, not as a good appointment to the issue of the marriage, but as an appointment to the child *itself*, and a settlement of it by *him* (*p*); but of course the mere circumstance of the child being made a party to the deed, and not executing or assenting to it, will not be sufficient (*q*).

Hitherto we have seen, that children only are objects of the power; but it still remains to inquire *what* children come within the scope of the power.

A power to appoint to children *living* at the parent's decease includes a child in *ventre sa mere* at that time (*r*). This point has been otherwise decided (*s*); but the law is now perfectly settled (*t*).

In Coleman *v.* Seymour (*u*), a man gave 3000*l.* to a married daughter for the use of her younger children, to be distributed amongst them as she should appoint; and Lord Hardwicke determined, that the gift did not extend to her children by a second marriage; and he was of opinion, that it extended only to children living

(*p*) Routledge *v.* Dorril, 2 Ves. jun. 357; Langstone *v.* Blackmore, Ambl. 289.

(*q*) Brudenell *v.* Elwes, 7 Ves. jun. 382.

(*r*) Beale *v.* Beale, 1 P. Wms. 244.

(*s*) Pierson *v.* Garnet; Cooper *v.* Forbes, 2 Bro. C. C. 38, 63.

(*t*) Clarke *v.* Blake, 2 Bro. C. C. 320; S. C. nom. Doe *v.* Clarke, 2 H. Blackst. 399; and see Thellusson *v.* Woodford, 4 Ves. jun. 226.

(*u*) 1 Ves. 209.

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at the making of the will, or at the farthest at the death of the testator. This question, however, seldom arises upon powers, because generally an interest for life in the fund is given to the parent, with remainder to his unborn children as he shall appoint; in which case, it is clear that the power embraces all the children. This is the case of every common marriage settlement (*v*).

Where the estate is settled on the eldest son and subject to that, a power is given of appointing portions to the younger children; a younger child who becomes the eldest before receiving his portion is not within the power (*x*). So where a power was given to appoint a sum amongst younger children, provided that the eldest son, or the *son* possessing the estate should have no share of it, and an appointment was made *nominatim* to Anthony, the second son, and the other *younger* children, and after the appointment Anthony became the eldest son by the death of his elder brother and the estate descended upon him, Lord Thurlow held, that Anthony could not take any part of the fund although the appointment was not revoked (*y*).

But in a case where provision was made by a private act of Parliament for an eldest son, and a power was given to the father to appoint a sum amongst his younger children, "Stephen, Martha, and Catherine," and Stephen, by the death of his elder brother, became entitled

(*v*) See Baldwin *v.* Carver, Cowp. 309; Hughes *v.* Hughes, 3 Bro. C. C. 355.

(*x*) Chadwick *v.* Doleman, 2 Vern. 528; Lord Teynham *v.* Webb, 2 Ves. 198; *vide supra*, ch. 7. sect. 2; and see Lady Lincoln *v.* Pelham, Bowles *v.* Bowles, and Leake *v.* Leake, 11 Ves. jun. 166, 177, 477.

(*y*) Broadmead *v.* Wood, 1 Bro. C. C. 77.

to the provision made for the eldest son, and then the father appointed a considerable sum to Stephen under his power; Lord Talbot said, this case arose upon an act of Parliament, in which the intent shall prevail against the very words, but then the intent must be plain and clear. Now Stephen was indeed called a younger child in the preamble, but when the power was given, it was not to appoint amongst the younger children generally, but to *Stephen, Martha, and Catharine*; and he held the appointment to Stephen to be a valid exercise of the power (*x*). Upon this statement of the case, then, it seems to establish this principle, that where a younger child is included by his *name* in a power, he will continue an object of the power, although he lose his character of younger son. But Lord Talbot principally distinguished this case from that of Chadwick and Doleman, on the ground that there the question was between the eldest son become so by his brother's death, and the other younger children; whereas in the case before him, Stephen was the only child left, and the dispute was between him and the administrator of a deceased child, so that this case cannot perhaps be relied on as an authority for the general principle, which at first sight it seems to establish; and certainly if the rule in Chadwick v. Doleman is the law of the court, the question in these cases ought to be, not whether the younger children are in the instrument creating the power called "younger children," or by their proper names; but whether, upon the whole instrument taken together, they are treated as younger children; and whether, judging from the evidence to be collected from the instrument itself, a

(*x*) Jermyn v. Fellows, For. 93.

portion

portion would have been provided for them if they had stood in the place of their eldest brother.

These cases profess to go merely upon the intention that the child is not a younger child within the power, and by a parity of reason where an eldest child is in effect a younger child, *with reference to the estate*, he may be an object of a power to appoint to younger children; as where an estate is settled on the son, and there is an eldest daughter, there, although in point of age the daughter is eldest, yet it is well settled that the son, as he takes the estate, though not so by primogeniture, shall be considered an eldest child, and the daughter, though eldest, shall be taken as a younger child (*x*); so an elder son unprovided for may take under a provision for younger children, as it is to the intention, and not to the words *elder* or *younger* that the court adverts (*y*).

But of course the change of character must take place before the receipt of the money, clearly a younger son becoming eldest, and taking the estate itself, cannot be called upon to refund a portion received out of the estate whilst he was a younger child, and in that character (*z*).

It remains to observe, that in the case of Hall *v.* Hewer (*a*), Lord Hardwicke laid it down, that there was no case where the court had considered a youngest child

(*x*) Pierson *v.* Garnet, 2 Bro.C C. 38. and see Beale *v.* Beale, 1 P. Wms. 244; Lord Teynham *v.* Webb, 2 Ves. 210; Heneage *v.* Hemlocke, 2 Atk. 456; Billingsley *v.* Wells, 3 Atk. 221.

(*y*) Duke *v.* Doidge, 2 Ves. 203, cited from Mr. Noel's note; and see Emery *v.* England, 3 Ves. jun, 232.

(*z*) And see Graham *v.* Lord Londonderry, 2 Ves. 199. 531, cited; but see ib. 212; and see Loder *v.* Loder, ib. 530, Coleman *v.* Seymour, 1 Ves. 209.

(*a*) Ambl. 203.

as an eldest, but between parent and children, or those who stand in *loco parentis* (*b*), but this distinction does not appear to be attended to at the present day.

II. We are now to consider in what manner the fund may be settled on the children.

A power to appoint a fund in such *proportion* as a party shall think fit, implies that he may apportion it out in such manner as he pleases, consequently he may give an interest for life in a particular share to one child, or limit the capital of the same share to another, or even go so far as to limit to a third child upon a contingency, provided he doles out the whole in this various way among all the children only. The power does not require that he should distribute it in *gross* sums, and give each child an absolute interest in that gross sum, for such a power enables the gift of particular interests, and the appointment of such interests (*c*); and a general power to apportion lands receives the same construction, therefore life estates or rent charges may in like manner be given to any of the children (*d*). Where under such a power it is wished to settle the estate on the eldest son, subject to portions for the younger children, it is usual to limit different parts of the estate to each of the younger children during a term, with remainder as to all to the eldest son in fee, and to give him a power of redeeming the estate by paying the portions intended to be provided for the younger children, nearly in the same way as in a common mortgage for a term of years.

(*b*) And see Lord Teynham *v.* Webb. 2 Ves. jun. 198.

(*c*) Alexander *v.* Alexander, 2 Ves. 640; Bristow *v.* Warde, 2 Ves. jun. 336.

(*d*) Thwaites *v.* Dye, 2 Vern. 80, *vide sup.* p. 363.

But

But under such a power, a merely reversionary interest cannot be given to any one child, as it is intended for a provision (*e*).

An appointment under the power to a daughter for her separate use independently of her husband, is so far from being an objection, that it is more strictly carrying into execution the will of the donor (*f*); and this is still more clearly authorised where the power is to appoint *in such manner* as the donee pleases (*g*).

In one case (*h*), a father having a power to appoint to his children, gave the interest of a portion to the husband of one of his daughters for life, and after his decease, the capital to the daughter herself. Lord Rosslyn said, that if he had given to the wife for life, and in case the husband should survive, to the husband, that would have been a substantial gift; for it was admitted, a gift for life was sufficient. He had done the same thing; for the husband would in that case, in point of law, have taken during the life of the wife. The insertion of the name of the husband, prior to that of the wife, was doing no more than if he had given to the wife first. The intention, therefore, not being to illude, but to give in effect such estate as a married woman could take, viz. for the benefit of the husband, as long as the coverture should continue, was not illusory. But the Chancellor principally relied upon

(*e*) Alexander *v.* Alexander, *ubi sup*; see Duke of Devonshire *v.* Lord G. Cavendish, 4 Term Rep. 744, n.

(*f*) Alexander *v.* Alexander, 2 Ves. 640.

(*g*) Maddison *v.* Andrew, 1 Ves. 59; and see Pitt *v.* Jackson, 2 Bro. C. C. 51; Smith *v.* Lord Camelford, 2 Ves. jun. 698; Crompe *v.* Barrow, 4. Ves. jun. 681.

(*h*) Bristow *v.* Warde, 2 Ves. jun. 336.

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the circumstance of the daughter having been provided for by her father in his lifetime.

Now it must be observed, that in the preceding case Lord Rosslyn did not mean to say, that the excess beyond the wife's life would not be considered void in case her husband survived her (*i*). And we should be cautious how we admit the doctrine, that the fund may be appointed to the husband even during the joint lives of him and his wife: for *he* is no object of the power; and although, as it was observed by the court, the husband will take during the life of the wife, where it is given to her, yet he will take in a different right, and subject to equities, to which he would not otherwise be liable. If he take under a direct appointment to himself, he may be considered as the absolute owner of it, whereas, if he merely take in his marital right, his wife would have her equity for a settlement out of it, which would bind his assignees if he should become bankrupt, his creditors claiming under an assignment from him, persons claiming under him without any valuable consideration, and perhaps even purchasers for a valuable consideration; and where the power rides over real estate, and operates under the statute of uses, it seems clear that an appointment to the husband would not invest him with the legal estate, he not being an object designated in the power. But it is probable, that under such an appointment, where the husband can take, he would be held to take in exactly the same manner as he would have done had the fund been appointed to his wife.

Thus far as to the quantity of interest which may be given to each child, and we may now consider what con-

(*i*) See Burleigh *v.* Pearson, 1 Ves. 281.

ditions

ditions may be imposed by the person executing the power.

In Pawlet *v.* Pawlet (*k*), Lord Hardwicke took this distinction, that where a father has only a power of appointment, or distributing portions which are to be raised at all events, he cannot annex any condition to the payment of any share which he appoints, otherwise it is where the portions are not to be raised at all without the father's appointment, for there the father may annex a condition. This, however, was a *gratis dictum*, and I have not met with any case in which the distinction has been acted upon. It would be difficult to establish it upon principle, as in each case the words of the *power* must be the guide of the father's appointment.

A parent having a power to appoint a fund amongst his children, cannot, unless he has a power to annex a condition, restrain a child's share to the payment of a particular debt, for there may be a defence to that debt. Therefore where a father appointed a share to his daughter to pay a debt of her husband's, for which the testator's son was surety, Lord Hardwicke set it aside. He considered it bad, because not given for her benefit, although by possibility the discharging her husband's debts might tend thereto. It might be otherwise (*l*). And of course he cannot annex any condition for his own benefit (*m*), nor can the property appointed, be exempted by the donee of the power from the debts of the appointee, but it must be left to take the fate of being his pro-

(*k*) 1 Wils. 224. *vide supra*, p. 410.
(*l*) Burleigh *v.* Pearson, 1 Ves. 281; and see Alexander *v.* Alexander, 2 Ves. 640.
(*m*) Robarts *v.* Dixall, 2 Eq. Ca. Abr. 668. pl. 19; App. No. 12.

perty,

perty, and subject to be come at as his creditors shall think fit (*n*).

This section may be closed with the observation, that powers to appoint to nephews, or any other class of persons, will be construed by the same rules as are applied to a power to appoint to children. Thus, as under such a power, grandchildren are not the objects, so a power to appoint to nephews cannot be extended to great nephews (*o*); yet as a settlement made in favour of the grandchildren with the assent of the child on his marriage, is valid, so a like provision may be made in the like case for great nephews.

(*n*) Alexander *v.* Alexander, 2 Ves. 640.

(*o*) Falkner *v.* Butler, Ambl. 514.

SECTION VI.

OF THE CONSTRUCTION OF A POWER TO APPOINT TO RELATIONS.

THE observations already made on appointments in general, apply equally to a power of appointment in favour of relations as to any other power, only that it seems to have been thought that a power of appointment to relations may receive a more liberal construction in favour of an exclusive appointment, than a power to appoint to children (*a*). We need therefore only enquire first, what sense is attached to the words relations, kindred, &c. which will shew to whom the fund will go under such a bequest in default of appointment; and 2dly, To whom an appointment may be made under such a power.

I. Nothing is better established than that under a bequest to "relations," without saying *what* relations, the fund shall go amongst all such relations as are capable of taking within the statute of distributions; and this has been adopted as the best measure for setting bounds to such general words, for the relation may be infinite (*b*),

(*a*) Spring *v.* Biles, 1 Term Rep. 435, note; and see Mahon *v.* Savage, 1 Rep. T. Redesdale 111; and *supra*, sect. 3, div. II.

(*b*) Anon. 1 P. Wms. 327; Roach *v.* Hammond, Prec. Cha. 401; Crossly *v.* Clare, Ambl. 397; Harding *v.* Glyn, 1 Atk. 469; Green *v.* Howard, 1 Bro. C. C. 31; Hands *v.* Hands, 1 Term Rep. 437, n.; 3 Bro. C. C. 69, cited; Rayner *v.* Mowbray, 3 Bro. C. C. 234; Mahon *v.* Savage, 1 Rep. T. Redesdale, 111; and see Rob. on stat. of frauds, 64, n.

although

although in two early cases the court extended it further (*c*), but these cases are clearly over-ruled by the current of authorities, and were expressly treated as of no authority by Lord Chancellor Camden in the case of Widmore *v.* Woodroffe (*d*).

The construction is the same upon the words "*near* relations (*e*)." And so upon a trust for "*friends* and relations," Lord Hardwicke said, that *friends* was synonimous to *relations*, otherwise it was absurd (*f*). And Lord Rosslyn has decided, that a bequest to relations by *blood or marriage*, was confined to relations entitled under the statute of distributions, and those who had married with them, although he said he was not sure that he hit the intention by it (*g*).

In a case in Peer Williams (*h*), the bequest was to *poor* relations, and a countess, as a relation within the limits, claimed a share, and it was decreed to her, in regard that the word *poor* was frequently used as a term of endearment and compassion, rather than to signify an indigent person, as one speaking of one's father, often says, my *poor* father, or of one's child, my *poor* child. But the reporter treats this as a case of compassion, the countess not having a sufficient estate to support her dignity. In a case before Lord Hardwicke, he appears to have determined, that where the bequest was to *poor* relations, it should not be confined to the rule of the statute of distributions, but should be extended to those

(*c*) Jones *v.* Beale, 2 Vern. 381; and Arnold *v.* Bedford cited, ib.
(*d*) Ambl. 640.
(*e*) Whithorne *v.* Harris, 2 Ves. 527.
(*f*) Gower *v.* Mainwaring, 2 Ves. 87.
(*g*) Devisme *v.* Mellish, 5 Ves. jun. 529.
(*h*) Anon. 1 P. Wms. 327.

that

that were of kin, *and objects of charity (i)*, although he held that this construction could not prevail where the bequest was to the *nearest* poor relations *(k)*. Sir Thomas Sewell also thought that the epithet *poor* was to be attended to, but he would not extend the bequest to relations beyond the limits *(l)*; and Lord Redesdale seems to have made a similar decision in the case of Mahon *v.* Savage *(m)*, where he determined that, under a bequest to *poor* relations, a person becoming rich before the distribution was not entitled. However, it was expressly decided by Lord Camden, that the addition of the epithet *poor*, or *necessitous*, or the like, does not vary the case, but the will must be read as if the word denoting poverty was not in it, *as there is no distinguishing between degrees of poverty (n)*, which we may observe is a much better reason than that given for a similar determination in the case in Peer Williams. So where the bequest was to the testator's relations "fearing God and walking humbly before him," these words were rejected by Lord Cowper. And in a later case (*o*), where it was to the relations "who were most deserving," the Master of the Rolls said, that he had no rule of judging of the testator's relations, and could

(*i*) Attorney-General *v.* Buckland, 1 Ves. 231; Ambl. 7, cited.

(*k*) Goodinge *v.* Goodinge, 1 Ves. 231; and Edge *v.* Salisbury, Ambl. 70.

(*l*) Brunsden *v.* Woolridge, Ambl. 507; see Isaac *v.* Defriez, ib. 595, 508; and see Carr *v.* Bedford, 2 Cha. Rep. 77; and 1 Bro. C. C. 33; and Gower *v.* Mainwaring, 2 Ves. 87, 110.

(*m*) 1 Rep. T. Redesdale, 111; but read the case; and see White *v* White, 7 Ves. jun. 423; but note, there the bequest was otherwise too remote, and void.

(*n*) Widmore *v.* Woodroffe, Ambl. 636; 1 Bro. C. C. 33, n.

(*o*) Doyley *v.* Attorney-General, 4 Vin. Abr. 485, pl. 16.

not

not enter into spirits, and therefore could not prefer one to another. Upon the whole, then, there appears to be great reason to contend that the true rule is, that the epithet poor, necessitous, or the like, is merely nugatory, although certainly there is a considerable weight of authority in favour of the contrary doctrine.

The words "most necessitous of my relations," or similar words, must receive the same construction as *poor* relations (*p*).

The signification imposed on the word *relations* is for the same reason extended to a bequest to "kindred (*q*);" and "next of kin" must likewise receive the same interpretation (*r*). A similar construction has been put upon the word "family(*s*)," although certainly that word may, according to the context, have different significations in different wills. It may be restrained to mean only the children (*t*). In one case Lord Alvanley at the Rolls construed it to embrace a husband of the party, although he cautiously referred his decision to the particular case before the court (*u*).

Lord Thurlow has justly observed, that a bequest to relations is not, under the foregoing construction, rendered totally inofficious, for the *wife* cannot claim, the statute providing for her by the name of wife (*x*). And as this construction is only made in the absence of evidence of the testator's intention, any express direction

(*p*) Widmore *v.* Woodroffe, *ubi sup.*

(*q*) Carr *v.* Bedford, 2 Cha. Rep. 77; and see 9 Ves. jun. 323.

(*r*) Phillips *v.* Garth, 3 Bro. C. C. 64.

(*s*) Cruwys *v.* Colman, 9 Ves. jun. 319; and see Gower *v.* Mainwaring, 2 Ves. 110; see Doe *v.* Joinville, 3 East, 172.

(*t*) See 9 Ves. jun. 324.

(*u*) Mac Leroth *v.* Bacon, 5 Ves. jun. 159.

(*x*) See 1 Bro. C. C. 33,

by

by him will be imperative. Therefore, where the bequest was to the relations, *equally* to be divided between them, Lord Talbot determined that an unequal distribution could not be directed (*y*); and he accordingly decreed them to take *per capita*, although under the statute they would have taken *per stirpes*, and "share and share alike" have the same meaning as "equally to be divided" (*z*). So where a testator explains the meaning which he attaches to the word, his will must be attended to, as where a testatrix gave a residue to be divided between her *relations*, that is, the Greenwoods, the Everits, and the Dows. The Everits were not within the degree of relationship limited by the statute, but were decreed to take jointly with the Greenwoods and Dows, who were (*a*).

It remains to observe, that parol evidence is inadmissible of the testator's intention not to confine the word relations, kindred, &c. It is immaterial that he knew *relations* to mean more than *next of kin*. It may however be shewn, that the testator had relations in a particular place, and that he knew them, but the evidence cannot be acted upon in opposition to the words of the will (*b*).

II. But although the court of necessity thus restrains the import of the word *relations*, yet, where a party has a power of selecting or distributing amongst *rela-*

(*y*) Thomas *v.* Hole, For. 231; Butler *v.* Stratton, 3 Bro. C. C. 367.

(*z*) Phillips *v.* Garth, 3 Bro. C. C. 64.

(*a*) Greenwood *v.* Greenwood, 1 Bro. C. C. 32, note.

(*b*) Goodinge *v.* Goodinge, 1 Ves. 231; see Green *v.* Howard, 1 Bro. C. C. 31, Edge. *v.* Salisbury, Ambl. 70.

tions,

tions, he may go beyond the rule which the court itself adopts when the distribution is made under its authority *(c)*. And the court will not deprive the donee of the discretion reposed in him, but will, although a bill is filed for an account and distribution, still permit him to exercise his power under the eye of the court *(d)*.

In this kind of bequests *in default of appointment*, the fund vests in the persons who are next of kin at the death of the donee of the power, and not in the persons who were next of kin at the death of the testator *(e)*.

(*c*) Harding *v.* Glyn, 1 Atk. 469; 5 Ves. jun. 501, stated from Reg. Lib.; Supple *v.* Lowson, Ambl. 729; Cruwys *v.* Colman, 9 Ves. jun. 319; Mahon *v.* Savage, 1 Rep. T. Redesdale, 111.

(*d*) Carr *v.* Bedford, 2 Cha. Rep. 77; Brunsden *v.* Woolridge, Ambl. 507; Bennett *v.* Honywood, ib. 708; Supple *v.* Lowson, ib. 729; Mahon *v.* Savage, 1 Rep. T. Redesdale, 111; and see Gower *v.* Mainwaring, 2 Ves. 87, 110; *sed vide supra*, p. 410, and qu. the distinction.

(*e*) Harding *v.* Glyn, Cruwys *v.* Colman, *ubi sup.* In common cases it is otherwise. Doe *v.* Lawson, 3 East. 278. As to the claim of representatives of relations, see Bennett *v.* Honywood, Ambl. 708; Mahon *v.* Savage, 1 Rep. T. Redesdale 111.

SECT.

SECTION VII.

OF POWERS TO JOINTURE.

It has been already shewn in what instances equity will aid the defective execution of a power to jointure (*a*), and the estates which may be created under the power have also been pointed out (*b*). It remains only to state such questions as may be said peculiarly to relate to this power, although certainly the decisions upon them would equally govern any other power of a similar nature.

As the object of a power to jointure is to enable the party to whom it is given to make a provision for the wife who shall survive him, and as the power, however frequently exercised, can only operate as a charge in one instance, the most liberal construction should be put upon the power in favour of a repeated execution of it. And it has been decided, that under a power, if a man's present wife die and he marry any other wife, *then and so often* to settle a jointure for *such* wife during *her* life, will enable him to settle a jointure upon any wife that he may afterwards marry, and so *totics quoties* (*c*).

But in a case where the testator directed, that if his son married a gentlewoman with a good fortune, the trustees should settle a rent charge on her for her life, and

(*a*) *Vide supra*, p. 287.
(*b*) *Vide supra*, ch. 9. sect. 2. div. 1.
(*c*) Hervey *v.* Hervey, 1 Atk. 561; Barn. Cha. Rep. 103.

 subject

subject thereto on the issue of that marriage in strict settlement; but if the son died without issue, then over; and the question was, how the estate was to be settled; Lord Hardwicke determined, that an estate tail should be given to the son after the strict settlement, as otherwise the issue of any future marriage could not take, which would defeat the testator's intention. He said it was objected, that this inconvenience would not happen here; for that the trustees might execute this power *totics quoties*, and that *gentlewoman* was *nomen collectivum*. But that, he said, would not be according to the construction of powers which can be executed but once, unless the words import otherwise, as it evidently was not there, although it might be executed upon a second wife, if not done before. And this decree, he added, answers all the words in the will (*d*). This case, it will be observed, can scarcely be ranked with those upon the common power of jointuring, for the object of the power was to make a strict settlement of the estate, and not merely to authorise the limitation of a jointure.

A general power to jointure to a particular amount, without expressing that it shall be clear of taxes, will only enable an appointment of the jointure, subject to natural outgoings, as parochial payments and repairs, &c. (*e*).

Where the jointure is to be of the *clear* yearly value, it means clear of incumbrances and all other charges, which by the course and usage of the country in which

(*d*) Allanson *v.* Clitherow, 1 Ves. 24.

(*e*) Hervey *v.* Hervey, 1 Atk. 561; Barnard. Cha. Rep. 103; Lady Londonderry *v.* Wayne, Ambl. 424.

the

the lands lie, ought to be borne by the tenant, but subject to the land-tax and all other outgoings, which according to such course of the country ought to be borne by the landlord. In the case in which this was decided, Lord Hardwicke said, that the word "clear" should be construed in the power as it would in an agreement between buyer and seller, that is, clear of all outgoings, incumbrances, and extraordinary charges not according to the custom of the country, as tythes, poor rates, church rates, &c. which are natural charges on the tenant. If, he added, in the country where these estates lie, it had been the custom for the landlord to pay those rates, he should have thought this jointure ought to have been subject to them, for they would in such case be only ordinary charges. But the contrary was proved, that it was not the custom of the country (*f*). And where the *custom* is for the tenant to pay, it is not material that in respect of the particular estate the landlord has agreed to pay them, so as to increase the nominal value of the lands by increasing the rent (*g*).

So under the words clear of *charge* or *reprize*, the jointure could not be limited clear of land-tax (*h*).

But where the power was to jointure to a stated amount, without any deduction or abatement, *for any taxes, charges, or impositions, imposed or to be imposed, parliamentary or otherwise*, but subject to leases in being at the time of such execution made, Lord Hardwicke decreed, that the power authorised a join-

(*f*) Earl of Tyrconnel *v.* Duke of Ancaster, Ambl. 237; 2 Ves. 500.

(*g*) S. C.

(*h*) Ambl. 240; 2 Ves. 501; as to the extent of the word *reprize*, see Hall *v.* Hall, 2 Dick. 710; and see 2 Atk. 545.

ture to be appointed, " free from all incumbrances, rent-charges, rents-seck, fee farms, quit-rents, annuities, stipends to ministers, pensions and procurations payable thereout, and also free from all parliamentary taxes or impositions of such nature and kind as were in being at the time of executing the power, and particularly from the land tax then in being (*i*) ;" and the words *free from taxes* particularly embrace the land tax as being the only tax to which land is absolutely liable (*k*).

And where a man having a power to jointure clear of all *taxes*, by articles referring to his power, agrees to grant a jointure free from *reprises*, or the like, although the words may not be co-extensive with those in the power, yet as the intention is evident, it shall be considered an agreement to grant such a jointure as is authorised by the power (*l*).

But Lord Hardwicke very properly determined, that where *land of a given value* is to be settled, the taxes from which the jointure is to be free, are such only as were in being *at the time of executing the power*, and the same as to the *quantum* of any existing tax, so that the land would not be free in the hands of the jointress from any future increase of the tax (*m*), for otherwise this mischief would follow, that whenever

(*i*) Marchioness of Blandford *v.* Duchess of Marlborough, 2 Atk. 542.

(*k*) Champernon *v.* Champernon, Dougl. 626 cited; and see on the general question, Brewster *v.* Kitchen, 1 Lord Raym. 317; Bradbury *v.* Wright, Dougl. 624; and see Da Costa *v.* Villareal, 1 Bro. C. C. 4. n.

(*l*) Marchioness of Blandford *v.* Duchess of Marlborough, 2 Atk. 542; Lady Londonderry *v.* Wayne, Ambl. 424, *et infra*.

(*m*) Marchioness of Blandford *v.* Duchess of Marlborough, 2 Atk. 542; and see Ambl. 239, 2 Ves. 502.

any

any tax varied, that would be a defect in the value of the jointure, and the jointress would come into a court of equity to make the defect good against the remainder-man.

And where lands of a given value are to be settled, the value is in other respects to be taken as it stood *at the time of the execution of the power*. This Lord Hardwicke repeatedly determined (*k*). If by any accident after the execution of the power, there should be an excess, it will be for the benefit of the jointress. By parity of reason, if there should be any deficiency by inundation or casualties, the jointress must acquiesce under it; to construe it otherwise would make these powers desultory (*l*). But in a subsequent case before Lord Northington, where the point was not much debated, he held that the value cannot be fixed with justice, *but at the time of the husband's death*. The wife cannot know the value but by inspection of leases, or by information, if the estates are in hand. The rent taken at a particular time, and under a particular letting, ought not to bind the wife. The rent of an estate is very uncertain; it often varies; the landlord is often obliged to give boons. Where he has been at an expense of improving, it is common for the tenant, instead of paying a sum of money for the improvements, to pay an increase of rent; and he accordingly decreed the value of the lands to be taken as at the time of the husband's death (*m*).

It is admitted on all hands, that the value is to be

(*k*) Marchioness of Blandford *v.* Duchess of Marlborough, 2 Atk. 542; Earl of Tyrconnel *v.* Duke of Ancaster, 2 Ves. 500, Ambl. 237.

(*l*) See 2 Atk. 544; and see Speake *v.* Speake, 1 Vern. 217; Pinnell *v.* Hallett, Ambl. 106.

(*m*) Lady Londonderry *v.* Wayne, Amhl. 424.

taken as it stood at some given time, and it requires not to be observed, that it is wholly immaterial whether the courts fix upon the time of the execution of the power, or the time of the husband's death. It is, however, to be lamented, that the rule is not perfectly established. With such conflicting authorities on the point it can scarcely be considered as settled.

Where a man covenants that a jointure is of a given value, the wife has of course a remedy to have the defect supplied out of her husband's assets (*n*), but where it is clear that the parties merely intended that he should execute his power, although he agrees to do something beyond it, the court will consider the excess as a mistake, and will not give the wife a compensation in respect of it out of her husband's assets. This was settled in the case of Londonderry *v.* Wayne (*o*), where a man having a power to jointure to the extent of 400*l.* generally, agreed to convey part of the estates comprised in the power of the yearly value of 400*l.* *clear of taxes and reprizes* to his wife, and afterwards executed his power *without* making the jointure clear of taxes. And Lord Northington decreed, that the insertion of the words "clear of taxes and reprises," was a mistake. The persons concerned imagined that the words of the power were to be so understood; and he was of opinion that it was not the husband's intention to covenant beyond his power of jointuring. Another ground relied upon was, that the settlement rectified the mistake, and that the wife who had reserved a great part of her own fortune to her separate use, and was assisted by her own solicitor,

(*n*) Probert *v.* Morgan, 1 Atk. 440. (*o*) Ambl. 424; and see the converse of this case *supra*, p. 438.

a man

a man of eminence, was to be considered as a feme sole, and capable of contracting, although she was under coverture.

But of course this rule can only prevail where it is evident that a *mistake* was made *by all parties*, therefore if the power was not known to the wife, and not referred to in the articles, it is clear that the wife might come against her husband's assets for any deficiency, although he should execute his power to the fullest extent, and it would be no plea that he himself mistook the construction or extent of his power.

It is very customary to give a man a power to jointure his wife in proportion to the fortune she brings, as 100*l.* per annum for every 1000*l.*; and as the object of such a power is, that the estate may not be incumbered in favour of a woman who brings no fortune into the family, any underhand execution of it will be set aside: a nominal portion is not sufficient, as if the husband or his friends advance money to make up the sum, and it is afterwards repaid (*p*), so although she has a portion, yet if it is settled to her separate use, it will not enable the husband to exercise his power (*q*), so perhaps if it were settled on the husband for life only, remainder to the wife absolutely.

But it is not necessary that the portion should be paid, and absolutely expended by the husband, as that would put it out of his power to make a reasonable settlement of it on his family, and yet enable him to waste and squander it away; therefore where the portion is settled in a proper and reasonable manner for the benefit of the family

(*p*) *Vide supra*, ch. 7, sect. 2.

(*q*) Lord Tyrconnel *v.* Duke of Ancaster, Ambl. 237, 2 Ves. 500.

in

in the fair way of contracting, that is not within the reason of the cases on fraud and collusion. Upon these principles Lord Hardwicke determined, that a settlement of part of the wife's portion on the husband for life, remainder on the younger children of the marriage, and in case there should be no such child on the survivor of the husband and wife, was not a fraud on the power, although the wife survived him, and there was no younger child, so that she herself eventually became entitled to her portion as well as her jointure (*r*).

Under a power of this nature, the tenant for life cannot bind the estate in the hands of the remainder-man in respect of any part of his wife's fortune, not received or ascertained till *after his death*, as the estate might otherwise be burdened with jointures, to take effect upon remote contingencies, or possibilities of further portions coming in. But if it be agreed, that in consideration of such future jointures, the wife's future property shall belong to the husband, as she cannot have the recompence, in consideration whereof it was agreed she should part with it, she will be entitled to retain such property herself (*s*).

(*r*) Lord Tyrconnel *v.* Duke of Ancaster, *ubi sup.*

(*s*) Holt *v.* Holt, 2 P. Wms. 648; *Vide supra*, p. 289.

SECT.

SECTION VIII.

OF THE EFFECT OF AN EXCESSIVE EXECUTION.

THERE are three modes in which a power may be exceeded: First, In the objects, as where a power to appoint to children or nephews is exercised in favour of grandchildren or great nephews. 2dly, In the interests given, as where, under a power of leasing for twenty-one years, a lease is granted for twenty-two years. 3dly, In conditions annexed to the gift, as where the fund is given on condition that the appointee pay a particular debt.

We have in this chapter already had occasion to treat of what amounts to an excessive execution of a power, and we have now only to consider the *effect* of the excess.

I. And first, *Where the power is exercised in favour of persons not objects of the power.* It hath before been observed, that a will made in execution of a power must receive exactly the same construction as a proper will. Now it is a rule of law, that where a testator has two objects, one particular, and the other general, and the particular one cannot be effected unless at the expense of the general intent, the latter shall be carried into effect at the expense of the former. This is the case where a man gives an estate to one for life, with remainder to his issue, but the estate is so given, that all the issue cannot take unless through their parent. The particular intent is, that the parent shall only take for life, the general intent is, that all the issue shall take, and in these

these cases, the court will effectuate the general, at the expense of the particular intent, by giving the parent an estate tail (1).

This doctrine applies with equal force to similar limitations in wills executed under powers. An important question has arisen in relation to it, upon which the Judges have been much divided in opinion. The question is, whether, under a power to appoint to children, an appointment to a child for life, remainder to his children, who are incapable of taking, shall give the child himself an estate tail in order to effect the general intent.

This point first arose in a case, where money was directed to be laid out in land to be settled, after the death of the husband and wife, to the children of the marriage, as the father by deed or will should appoint. The father, by his will, directed part of the fund to be laid out in real estate to be conveyed to the use of his daughter, *during her life*, for her separate use, remainder to all and every the child and children of his daughter as tenants in common. Lord Kenyon, then Master of the Rolls, determined, that in order to effec-

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(1) This doctrine appears to have been carried too far. And it is established, that where there is only a *single* intent to create a perpetuity, and not a *particular and* a *general* intent, the court cannot enlarge the limitation, as where there was a devise to A for life, and *after him* to his eldest or any other son during his life, and after them to as many of his descendants, issue male, as should be heirs of his or their bodies down to the tenth generation during their lives, it was determined that A took for life only, Seward *v.* Willock, 5 East. 198; Somerville *v.* Lethbridge, 6 Term Rep. 213; and see White *v.* Collins, Com. 298; but where the devise amounts simply to an executory trust, a court of equity may effectuate the intention; see Humberston *v.* Humberston, Prec. Cha. 454, 1 P. Wms 333; 2 vol. Ca. and Opin. 417.

tuate

tuate the testator's general intention, the daughter must be considered as taking an estate tail (*a*).

In the case of Griffith *v.* Harrison (*b*), where the devise was to the wife for life, with an exclusive power of appointing by will to the children, but so as the estate should not be divided but transmitted entire to his heirs, the wife by will, gave the estate to one of her sons for life, remainder over to his children in strict settlement, and so to her other children and their children successively in like manner. The Judges of the court of King's Bench were divided in opinion upon the operation of the will creating the power. Lord Kenyon and Grose J. agreed that there was an excess in the execution of the power; but they certified that, although the appointment could not, as they conceived, take effect in the particular manner the widow intended, yet her *general* intention being that the children of her several children should take estates of inheritance in tail general on the death of their respective parents, they thought that that general intention should be carried into execution as far as the power given by the husband would allow; and, consequently, that the *children* respectively took estates in tail general. This construction they thought fairly warranted by great authorities. This opinion, we must perceive, accords precisely with Lord Kenyon's decision in Pitt *v.* Jackson. The other two Judges, Ashurst and Buller, did not deliver any opinion on this point, for they thought, on the authority of the Duke of De-

(*a*) Pitt *v.* Jackson, 2 Bro.C C.51; See Phelp *v.* Hay, App. No. 11; but note, there the devise was to *issue*, which may be considered a word of limitation.

(*b*) 4 Term Rep. 737.

vonshire

vonshire *v.* Cavendish (*c*), that the power authorised a limitation in strict settlement, but, if it did not, then they thought that it authorised a limitation to the *children during their lives* only. In a prior case, however, Mr. Justice Buller appears to have entirely agreed with Lord Kenyon's opinion in Pitt and Jackson (*d*).

The case of Griffith *v.* Harrison arose upon a case sent out of the court of Chancery; and, upon the first hearing, the Lord Chancellor seemed to think that it was not an estate tail (*e*). It does not appear what ultimately became of the case; but, as it was a bill filed against a purchaser for a specific performance, it should seem that, on the general rule of equity, the bill was dismissed by reason of the different opinions of the Judges, a purchaser not being compellable to accept a doubtful title.

In Routledge *v.* Dorril (*f*), Lord Alvanley said, that he subscribed to the case of Pitt *v.* Jackson, *as far as it was decided, with regard to real estate settled to a person who was an object of the power for life, with limitations in strict settlement, to persons not objects of the power,* for that was decided in Humberston *v.* Humberston (*g*), and Spencer *v.* Duke of Marlborough (*h*). Pitt *v.* Jackson was, he said, a case of real estate. The first and other sons were incapable of taking as purchasers. Lord Kenyon thought, that as it was perfectly clear it was intended to go to the daughter and her issue, and they could not take as purchasers, to ef-

(*c*) *Vide supra*, p. 412.
(*d*) See Robinson *v.* Hardcastle, 2 Term Rep. 254.
(*e*) 3 Bro. C. C. 410.
(*f*) 2 Ves. jun. 364.
(*g*) 1 P. Wm. 332.
(*h*) 5 Bro. P. C. 592.

fectuate

fectuate the general intention of the testator, it should be so moulded, and he relied upon Chapman *v.* Brown *(i)*. There, according to the report, Lord Mansfield laid down that doctrine, and he (Lord Alvanley) did not find much objection to it, viz. *that where there is a limitation for life, to a person unborn, with remainders in tail to the first and other sons, as they cannot take as purchasers, but may as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed an estate tail in the person to whom it is given for life.*

In a case which occurred nearly sixteen years after Pitt *v.* Jackson, Lord Kenyon said, that perhaps no case had carried the doctrine farther than he did in Pitt *v.* Jackson, and he knew that great Judges entertained considerable scruples at the time concerning that decision. It went indeed to the outside of the rules of construction, yet still he did not think it was wrong (*k*). In Routledge *v.* Dorril, Lord Alvanley said, that he knew the doctrine in Pitt *v.* Jackson had by very great authorities been questioned. Indeed, although, apparently, the fact is not generally known, the case of Pitt *v.* Jackson ultimately met with no decision. The case afterwards came on to be heard before Lord Rosslyn, and it then appeared, that the children, in default of appointment, were to take estates tail *under the settlement.* And the Chancellor said, that under the circumstances, and if the necessity of the case obliged the court to consider how to dispose of this strange execution of the power, he should be very much inclined to adopt the idea Lord Kenyon pursued; but, as the child took an

(*i*) 3 Burr. 1626.

(*k*) Brudenell *v.* Elwes, 1 East, 451.

estate

estate tail under the settlement, he determined that the appointment was void beyond the life estate; therefore, there was only this difference, that under the original settlement she would have an estate tail at once, and, in this way, an estate for life, remainder to herself in tail, which was the same, for her life estate was moulded in it (*k*).

This doctrine, then, has never been decided, but it rests on high authority. Had Lord Kenyon been Chancellor, instead of Master of the Rolls, the point evidently would have been decided: and, paradoxical as it may appear, his decision at the Rolls, although reversed, was not over-ruled. The opinions, too, of Mr. Justice Buller, Mr. Justice Grose, Lord Alvanley, and even Lord Rosslyn, all stand in favour of Lord Kenyon's doctrine. But although this doctrine of *cypres* may, with reference to wills, be considered as firmly established, yet it must not be carried too far. It has never, for instance, been ruled, that a limitation by will of a legal estate to an *unborn* child for life, remainder to his children, will be construed to give the intended tenant for life an estate tail (*l*).

Nor will this construction prevail, unless it will clearly effectuate the testator's general intention. Therefore, in a case (*m*) where the estate was given by a settlement to the children as the father should appoint, and in default of appointment, to them as tenants in common in tail, with cross remainders in tail, and the father by his

(*k*) Smith *v.* Lord Camelford, 2 Ves. jun. 698; and see Bristow *v.* Warde, 2 Ves. jun. 336.

(*l*) See 2 Ves. jun. 365; Seaward *v.* Willock, 5 East, 198.

(*m*) Bristow *v.* Warde, 2 Ves. jun. 336.

will

will appointed part of the estate to one of his sons, Henry, for life, remainder to the children of Henry, as he should appoint. It was insisted that Henry should take an estate tail; and Lord Rosslyn, in the course of the argument, asked why he could not put that construction on the devise; to which he was answered, that it was intended that the children (of Henry) should take absolutely, not that it should go as an estate tail would carry it. It was said, that the principle of all the cases for an implied estate tail is, that there was a clear *indicium* of an intention that all the issue should take in the course in which an estate tail would go, but that no inference could be drawn from those cases to this, where there was no such indication. Lord Rosslyn, in delivering judgment, adopted these arguments: he said, that the case of Pitt *v.* Jackson would not enable him to do the same thing here, for here it was a power to Henry to appoint to children in such shares as he thought fit. No estate tail was given, nor was any intention of that sort expressed; but the children would take either by appointment, or for want of it, distributively *per capita*. Therefore that did not apply: and he was under the necessity of saying, the interests to the children of Henry could not in any respect take effect.

The doctrine of cypres does not apply to personalty. It was originally introduced in favour of the testator's intention. If it were extended to personal estate it would defeat the intent, as it would vest the personalty in the executor, and not in the children on the death of the parent (*o*).

(*o*) Routledge *v.* Dorril, 2 Ves. jun. 364; and see Knight *v.* Ellis, 2 Bro. C. C. 570; Keily *v.* Fowler, Wilm. 298.

And the rule is expressly confined to wills. It does not extend to limitations by *deed* of either real or personal estate. In Brudenell v. Elwes (*p*), Lord Kenyon himself expressly laid it down, that this doctrine of cypres went to the utmost verge of the law, even in the construction of wills, but that it had never been applied to the construction of *deeds*; and he accordingly refused to extend it to a limitation in a *deed* executing a power. In the same case, Lord Eldon observed, that the case did not come near Pitt v. Jackson, and the other cases upon wills; first, as they were cases upon wills, not deeds, to which this doctrine had not been applied: secondly, those cases had at least gone, as Lord Kenyon observed, to the utmost verge of the law, and he should find it very difficult to alter an opinion he had taken up, that it was not proper to go one step further; for in those cases, in order to serve the general intent, and the particular intent, they destroy both (*q*).

Where a partial interest is given to an object of the power with *remainders* to persons not objects of it, and the doctrine of *cypres* cannot be applied, yet the whole appointment will not be void, but merely that part which is not authorised by the power. This rule is observed as well at law as in equity. The point was expressly decided at law in Adams v. Adams (*r*), which was a case sent out of the court of Chancery, where under a power to appoint to children, the estate was given to the two daughters for life in moieties, remainder to their children in strict settlement. The court of B. R. certified, that

(*p*) 1 East, 451. (*r*) Cowp. 651.

(*q*) 7 Ves. jun. 390; and see Adams v. Adams, Cowp. 651.

though

though they were of opinion that the donee had exceeded her power, which was confined to child or children, by limiting estates to her grandchildren, yet they thought that the same ought to prevail so far as her power extended, and that the limitation to her daughters for life was good; but that the disposition of the inheritance to their child or children was void (*s*). The same decision was made in equity by Lord Rosslyn in the case of Bristow *v.* Ward (*t*), although it was contended, that if the appointment could not take effect in the manner the distribution was made by the parent, the question would be what he would have done if he had been apprised that, part failing, there would arise an inequality unforeseen by him as to his children. But Lord Rosslyn said, that the answer was, nobody could tell what he would have done, but that was not a ground for setting aside the whole; for each child to whom he had well appointed, had a right to claim that (*u*).

But there is infinitely more difficulty where the fund is given generally amongst persons, some of whom are objects of the power, and some of whom are not. This was one of the many points in Alexander *v.* Alexander (*x*), where under a power of appointing a personal fund amongst *children*, the wife gave a portion of it to trustees, "upon trust to pay the interest thereof weekly, or otherwise, in such manner as the trustees should think most beneficial

(*s*) And see accordingly Brudenell *v.* Elwes, 1 East, 442; 7 Ves. jun. 382.

(*t*) 2 Ves. jun. 336; and see Roberts *v.* Dixwell, App. No. 12, the appointment over of the 2000*l.*

(*u*) And see Routledge *v.* Dorril, 2 Ves. jun. 357; Crompe *v.* Barrow, 4 Ves. jun. 681; Smith *v.* Lord Camelford, 2 Ves. jun. 698.

(*x*) 2 Ves. 640.

for the personal support and maintenance of her son Francis, *and his wife and children.*" Sir Thomas Clarke, Master of the Rolls, first held that the discretionary power to the trustees was void. He then treated the case as if the mother had given it herself indefinitely for the benefit of Francis, his wife and children, laying the discretionary power out of the case as if never inserted in the will, and then he said, certainly so far as the wife and children were to have the benefit of it that would not be good. And he thought that this appointment would not be considered a complete execution as to Francis, for the wife and children were to have something, and there was no possibility of distinguishing how much she exceeded her power. He then proceeded to consider whether there was any other way to make this good, and, by a very artificial train of reasoning, he came to the conclusion, that Francis might take the whole fund, and decreed accordingly. His argument was this: "I own (*y*) I incline to think there is a method: suppose the mother, instead of using the words she has, had given this one fourth, to be applied in such way as was most beneficial for her son and his wife and children, *if they shall by law be capable*; I should not have doubted but that as the wife and children are not by law capable, it would be absolute to Francis; and the question is, whether there is any difference? This bears an analogy to what the dispositions by the mother would be, if she had given it to a son by name who never appeared to have existence, or was never capable of taking; if given to these four indefinitely, and three were incapable of taking, the fourth would

(*y*) 2 Ves. 645.

have

have the whole, must take such, as the others were incapable of taking. It falls within the reason of the late case of Humphrey v. Taylour (z), where a personal estate was given to two in joint-tenancy; one was outlawed; and therefore the testatrix made a codicil, whereby she adeemed what was given to one of the two; the question was, whether the other joint-tenant should take only a moiety? But the court held, he was to take what the other did not, they were to take the whole between them. The mother never designed this fourth part should fall into the residue, and it would be extremely hard that it should. Then he will be intitled to the whole of that."

The foregoing reasoning is not satisfactory, and it cannot be considered clear that a similar case would now receive a similar decision. At least, it is well settled by later determinations, that a gift under a power embracing objects not within the line of perpetuity is wholly void, and the fund cannot be given to those to whom it might have been legally appointed.

Thus in Gee v. Audley (a) there was an appointment by will of 1000*l.* in default of issue of Mary Hall, equally to be divided between the daughters then living of John Gee and Elizabeth his wife; and if that had been restrained to the death of the person executing the power, it would have been good. The bill was brought by the four daughters of John and Elizabeth Gee to have the fund secured for their benefit upon the death of Mary Hall without issue. Lord Kenyon held, that as the execution would take in children born after the death of the appointor, it was too remote, and he would not wait to see what contingency would happen.

(z) Ambl. 136.

(a) 2 Ves. jun. 365, cited.

The same point arose in the case of Routledge *v.* Dorril (*b*), and Lord Alvanley, then Master of the Rolls, started the question, whether those children who might have been the proper objects should take. At first he said he was of opinion, that as she might have appointed to the three children born before her death, when she appointed to all, these three might be considered as the sole objects, but upon considering it farther, and particularly upon Gee and Audley, he was of opinion that would be a forced construction; and that the donee, in affecting to give this to all the issue her daughter might have at any time, had transgressed the power, and so far being ill executed, it was to be considered as not executed, and was totally void. The donee, he observed in another place, did not mean those only to whom she *might* have appointed, but *all*, and upon failure of all, then and then only she gave it over.

In the case of Alexander *v.* Alexander, Sir Thomas Clarke addressing himself to the impossibility of discovering the excess in the case before him, because it was given indefinitely, said that had it been free from that circumstance of uncertainty how much each was to take, *it would be void as to the wife and children.* Suppose, he added, she had given it to the husband, his wife and children, in gross sums absolutely, *equally to be divided*, that would have been bad, and an excess of her power, and if it had been such a partial appointment, *so far as void*, it would have fallen into the residue.

Now in the cases of Gee and Audley, and Routledge and Dorril, the fund *was* given *equally* amongst the children, but yet the court would not consider the ap-

(*b*) 2 Ves. jun. 357.

pointment

pointment good *pro tanto*. However those cases turned on the remoteness of the limitation, and it should still seem that where the fund is given amongst several objects, some of whom cannot take, and the excess can be ascertained, the objects who are capable may in most cases take their shares; as if a fund should be given between the parent capable, and his children incapable, in equal moieties, it seems clear that the parent would be entitled to his moiety; so if the fund were given equally amongst the objects of the power, and strangers living and ascertained, there appears to be no solid principle upon which the real objects could be refused the shares to which they would have been entitled upon a division if the whole appointment had been valid (*a*).

Although a limitation be void as not authorised by the power, yet it is not considered absolutely void, so as to accelerate the remainders dependent on it, which if given immediately, would have been good; but notwithstanding that it be void itself, yet it prevents the limitations over from taking effect (*b*), for as Lord Alvanley observed, it would be monstrous to contend, that though it was appointed to the remainder-man in failure of the existence of persons incapable of taking, yet notwithstanding they exist, he should take as if it was well appointed to them, and they had failed. It is given upon a contingency, upon which there is no right to give it (*c*). And where the first limitation is too remote, and therefore void, a subsequent limitation to an object of the power, shall not take effect, although the per-

(*a*) See 2 Ves. 644.

(*b*) Alexander *v.* Alexander, 2 Ves. 640; Robinson *v.* Hardcastle, 2 T. Rep. 241.

(*c*) Routledge *v.* Dorril, 2 Ves. jun. 357.

sons

sons intended to take under the void limitation have actually failed.

But in a case where the fund was given to a son who was an object of the power for life, and after his decease to his wife and children who were not. *But in case he should die without leaving a wife or child him surviving*, then to his sister who was an object of the power. The trusts for the wife and children were determined by Lord Alvanley to be bad, but he at the same time held, that if the son should die without leaving a wife or child surviving, the gift over to the daughter would be good. And he distinguished this case from the others, on the ground that this limitation over to the daughter was, if the son should die without leaving a wife or child surviving. It fails as far as it affects to give interests to the children, but was there, he asked, any occasion to make it fail upon the other point, the gift over to a person who is an object of the power. Why was he to exclude the person taking over who had a right to take? There were two alternatives. If the son should leave no wife or children at his death, then the limitation over being to a good object would take effect; if he should leave a wife or children, then it could not take effect (*c*). As Lord Kenyon observed in a subsequent case (*d*), the case went upon the ground of its being an appointment with a double aspect, and therefore that if the contingency which went beyond the power should not happen, it would not stand in the way of those who might take under the appointment in the event which happened, and who were within the power.

(*d*) Crompe *v.* Barrow, 4 Ves.jun. 681; and see 3 Bro. C. C. 415. (*e*) Brudenell *v.* Elwes, 1 East, 450.

So

So where actual estates are not attempted to be given, but a mere power is limited to a stranger to appoint the fund, and in default of appointment the fund is given amongst proper objects, the power being merely void on the ground, that *delegatus non potest delegare* (*e*), the ultimate limitation will take effect in possession. This was decided by Lord Hardwicke in Ingram *v.* Ingram (*f*), where, however, the delegated power was to appoint the fund amongst the objects of the original power, and in default of appointment, the fund was given to the same objects. It should seem that the rule would not prevail where a power is affected to be given to appoint the fund amongst *strangers*, because in that case it would be the intention of the donee of the original power, that the objects should not take unless in default of execution of the delegated power in favour of the strangers. The intention of the donee of the power is the express ground upon which limitations over to good objects after limitations to strangers are held to be void, and the principle applies as forcibly to a direct *power* to appoint to strangers as to a direct gift to them. Nor would the rule, for the same reason, apply to a case where the delegated power is to appoint to some of the objects, and the fund in default of appointment is given to *others*, although objects of the original power. But in this last case it might be otherwise, if in default of appointment under the delegated power, the fund was given amongst *all* the objects.

Secondly, *As to excess in the quantity of interest*—the same principle prevails. Where there is a complete

(*e*) *Vide supra*, ch. 4, sect 1. (*f*) 2 Atk. 88.

execution,

execution, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void, but where there is not a complete execution of a power, and the boundaries between the excess and execution are not distinguishable, it will be bad (*g*).

If a man having a power to lease for twenty-one years lease for forty, that will be good in equity *pro tanto*, because it is a complete execution of the power, and it appears how much he has exceeded it (*h*). This point has often been decided, and was determined in the great case of Campbell and Leach (*i*), where under a power of leasing for twenty-one years, a lease for twenty-six years was granted, and it was holden to be void only for the excess. But it was admitted at the bar in that case, and appears to have been considered by the court, that the excess rendered the lease void at *law*; and Hale, when Chief Baron, expressed his opinion clearly, that if a man has power to make leases for twenty-one years, and he make a lease for twenty-two years, it is not good for twenty-twenty-one years (*k*). And although a court of law might well consider the excess only as void, yet we cannot fail to distinguish this case from cases like that of Adams and Adams (*l*), where a *distinct and independent* limitation is introduced, not authorised by the power; whereas in cases like Campbell and Leach, the excess is interwoven with the limitation authorised by

(*g*) Per Sir Thomas Clarke, 2 Ves. 644.

(*h*) Ibid, and see Parry *v.* Brown, 2 Freem. 171, 3 Cha. Rep. 610, Nels. Ch. Rep. 87; and see Anon. 2 Freem. 224; Barnard. Cha. Rep. 116.

(*i*) Ambl. 740.

(*k*) Hard. 398.

(*l*) *Vide supra.* p. 450.

the

the power. However, the liberality of modern times may perhaps induce the courts of law, even in these cases, to ascertain the boundary, and to uphold the lease so far as it is authorised by the power (*o*). But this can never be done where the lease is made contrary to the power to commence *in futuro*, for no limitation of the term will make a lease in reversion a lease in possession (*p*).

Where a *distinct* limitation is superadded, it will be merely void, and will not affect a prior valid appointment, even at law, as if under a power to lease for twenty-one years, a lease be accordingly made for twenty-one years, and by the same deed, the donee limit a further term in this manner, viz. *and from and after the term aforesaid for one year more*, the power will be well executed by the first limitation, and the excess will be surplusage not to be regarded (*q*). The leading case of Commons *v.* Marshall (*r*) appears to have been decided on this ground. There, Lord Netterville had a power of leasing for any term, not exceeding thirty-one years *or* three lives, to commence in possession, and he granted a lease for three lives, *or* for thirty-one years, *which should last longest*. The Court of Exchequer in Ireland, construed the word *or*, into *and*, and so made it a lease certain for lives, with a *remainder* of thirty-one years; and, considering the excess only as void, gave judgment in favour of the lessee. Upon appeal to the Exchequer Chamber in Ireland, Lord Chief Justice Annaly delivered his opinion for reversing the judgment, but the

(*o*) see Doe *v.* Calvert, 2 East, 376.
(*p*) Doe *v.* Calvert, 2 East, 376.
(*q*) Fitzg. 157.
(*r*) 7 Bro. P. C. 111.

Lord

Lord Chancellor being of a different opinion, affirmed it. Upon this a writ of error was brought in parliament; and it was insisted for the plaintiff in error, that the words *which shall last longest* shewed that *both* the term for lives and years were not intended to pass, but one only, and which it should be was to depend upon the event mentioned, and could not therefore *commence in possession* at the making of the lease, as expressly required by the power. On the other hand, it was insisted that the lease, so far as it was a lease for three lives, was clearly warranted by the power; and this was apparently the primary object of the parties. Besides this they had a second in view, which was to secure the estate to the lessee for thirty-one years, in case the lives should determine sooner. But this was not warranted by the power, and was therefore void; but the excess only was to be corrected. The judges here gave an unanimous opinion in favour of the lease, and the House of Lords decreed accordingly.

But where the limitations, although several and distinct, make but one estate in law, the appointment is wholly void at law by reason of the excess; as if under a power to appoint for life, the donee appoint to the object of the power for life, and after his death, to the use of his (the appointee's) heirs or the heirs of his body, the two limitations coalesce, and the appointment is, in effect, of an estate in fee, or an estate in tail, and therefore, is at law, void *in toto* (*s*), although the excess would be corrected in equity.

In equity also, a power to charge a particular sum,

(*s*) Fitzg. 157.

as

as 7000*l.* will be duly executed by a charge of a larger sum as 8000*l.* and the excess only will be void (*t*).

So, equity will correct a mistake in the execution of a power, with respect to the time at which the interest should commence (*u*).

In some cases, a power, at first sight, appears to be exceeded, when, in fact, it is not. As in the case of Thomlinson *v.* Dighton (*x*), where a tenant for life, with a power to appoint the inheritance to her child, limited the estate to herself for life, *without impeachment of waste*, with remainder to her child in fee. And it was objected, that the conveyance left in her an an estate for life, *without impeachment of waste*, which was not in her power to do; Lord Chief Justice Parker, in delivering the unanimous opinion of the court, said, that the child would be in, not by virtue of her conveyance, but by the will creating the power, and so would over-reach her estate without impeachment of waste; and consequently, that clause in the conveyance, "without impeachment of waste," would have no operation, for the child might, notwithstanding, bring an action of waste against her.

So, where the quantity of interest to be taken by the appointee, is expressly limited by the instrument creating the power, and the donee is only authorised to appoint the *lands* over which the estate is to ride, an appointment by him of an interest exceeding that intended to be given to the appointee, is tantamount, even at law,

(*t*) Parker *v.* Parker, Gilb. Eq. Rep. 168.

(*u*) Probert *v.* Morgan, 1 Atk. 440.

(*x*) 10 Mod. 31, 71.

to

to a regular appointment. This is the case of Peters *v* Morehead (*y*), where an estate was given by will to the son for life, and then the testator devised *such part of the said lands as his son should appoint* to such wife as the son should marry, for her life, with remainder to the sons of the son. The son exercised his power by granting the estate by deed, merely sealed and delivered, to trustees in trust for himself for life, and after his death, to the use of his intended wife for life, and after her death to the use of the heirs male of her body. The court thought, that as the two limitations made but one estate in the wife, it would, in a common case, have been a void execution, but they held that the son had power, not to limit the estate, but to appoint the land, so that the question simply was, whether he had sufficiently specified the land, and they decided in favour of the validity of the appointment. Eyre, Chief Justice, even thought that, though the son had limited an inferior interest, yet the wife should have an estate for her life; but Fortescue is reported to have doubted if the son had barely appointed the land without limiting any estate, whether it would be good. It is observable, however, that the learned judge does not notice this doubt in his own report of the case, and it certainly is directly over-ruled by the decision itself, which was, that the son had no power to limit the estate in the land, but only the land itself, and it is in express opposition to the opinion of the Chief Justice, that the wife would have taken for life, though a less estate had been limited to her.

(*y*) Fort. 339, Fitzg. 156.

Thirdly,

Thirdly, *As to conditions annexed to the gift not authorised by the power.* In these cases the gift is good, and the condition only is void, so that the appointee takes the fund absolutely. As if an appointment should be made, and a condition annexed to it, that the appointee shall release a debt owing to him, or pay money over, the appointment would be absolute, and the condition only would be void, as the boundaries between the excess and proper execution are precise and apparent (*z*). So it should seem, that if, under a power to appoint an estate to an object in tail, or in fee, the donee appoint to him in tail or fee with a proviso, that if he die under twenty-one without issue, or the like, the estate shall go over, the first appointment will be good and the qualification annexed to it will be void.

In the case of Roberts and Dixall (*a*) the father's estate was charged with 1000*l.* for younger children, and he had a power over his wife's estate, in favour of the younger children. He gave the only child 3000*l.* which he declared should be in satisfaction of the 1000*l.* charged on his own estate, and, in pursuance of this power, he charged the 3000*l.* on his wife's estate. Lord Hardwicke said that, where a gift was to discharge a former debt, something should move from the giver, but, here, the whole was to arise out of his wife's estate, and, therefore, to satisfy the father's covenant as to the charge on his own estate, this declaration was entirely void; however, as his intention was only to give his daughter, 3000*l.* Lord Hardwicke decreed that 2000*l.* ought to be

(*z*) See 2 Ves. 644, and see Burleigh *v.* Pearson, 1 Ves. 281.

(*a*) 2 Eq. Ca. Abr. 668. pl. 19. S. C. App. No. 12.

raised

raised upon the wife's estate, and the other 1000*l.* out of the father's estate.

Perhaps we should, in this place, notice a point which arose in Robinson *v.* Hardcastle (*b*), but was not decided. The donee of the power appointed the estate by his will, *charged with the payment of his debts*, which he had no authority to do, and Mr. Justice Buller said, that this, *perhaps*, might render the *whole* execution of the power void. There is, however, no authority for this. If the estate had been given to the object of the power, upon condition that he paid the donee's debts, the appointment would have been good even at law, and the condition void. This case is, in effect, the same and would, it should seem, receive a similar decision. At any rate, in equity, the excess only in the appointment would be void.

We have already had occasion to consider the converse of the cases just discussed, viz. where an interest can be granted short of that authorised by the power (*c*).

This subject must not be dismissed without observing, that a valid appointment will be sustained, although confounded in the same deed with other subjects not relating to it. In Lord Conway's case, it appeared that he, having power to grant leases of his estate, by one instrument granted several, some of which were not within the power; and though all were by the same instrument, they were considered as several leases, and it was sent to the Master to separate them (*d*).

(*b*) 2 T. Rep. 241.
(*c*) *Vide supra*, sect. 2.
(*d*) 2 Ves. 645, cited.

SECT.

SECTION IX.

HOW ESTATES GO IN DEFAULT OF, OR WHERE THERE IS A BAD APPOINTMENT.

We have already had occasion to consider the effect of the *creation* of a power on the estates limited in default of appointment (*a*), and also in what cases the objects take in default of appointment, although there is no express substantive gift to them in that event (*b*). It will here, therefore, only be necessary to state, 1. a few cases which have arisen on particular limitations in default of appointment, and, 2. to shew how estates go where there is a bad appointment. And,

1. A general power of appointment may be cut down to particular objects by reason of a gift over to them in default of appointment (*c*); and by a parity of reason, a general gift over in default of appointment may, in favour of the intention, be restrained to the objects to whom an appointment might have been made (*d*).

Where a power is given to a tenant for life to appoint to his children, and in default of appointment the fund is given to the children at a particular age, as at twenty-one, although it is expressly declared, that if any child shall attain twenty-one in the life of its parent, his share shall be considered as a vested interest subject to the life estate; yet that provision will only relate to *unappointed* shares, and the power will not be

(*a*) *Vide supra*, ch. 2. sect. 4.
(*b*) *Vide supra*, ch. 6. sect. 3.
(*c*) *Vide supra*, p. 376
(*d*) *Vide supra*, p. 400, 401.

defeated by the children attaining twenty-one before it is exercised; nor will it give them vested interests at that age in what may have been actually appointed to them (*e*).

We have seen, that a mere power in words may imply an absolute gift to the objects in default of appointment. Where this is the case, and no appointment is made, it frequently becomes a question whether the objects take as tenants in common or as joint tenants. In Maddison *v.* Andrew (*f*), the fund was to be disposed of *to and amongst* the testator's daughters, as his wife should appoint. It was not necessary to decide the point, but Lord Hardwicke expressed his opinion that the bequest was joint. But in a case before Lord Rosslyn, where the devise was to A in trust, to give, &c. the estate *unto and amongst* his children as he should appoint, he held it to be a tenancy in common (*g*); and, in a similar case, the present Master of the Rolls followed that case as an authority (*h*), and decided accordingly.

In the case of Routledge *v.* Dorril, there was a gift in default of appointment to the children, grandchildren, or issue generally of the marriage, living at the decease of the survivor of the husband and wife, with a proviso that, in case of no appointment, the issue of any child dead should not have a greater share than his parent, if living, would have been entitled to; and Lord Alvanley determined, that although the children

(*e*) Boyle *v.* Bishop of Peterborough, 1 Ves. jun. 299; and see particularly p. 309.

(*f*) 1 Ves. 57.

(*g*) Reade *v.* Reade, 5 Ves. jun. 744.

(*h*) Casterton *v.* Sutherland, 9 Ves. jun. 445.

of

of a living parent might have had shares appointed to them under the power, and not being made objects of it, if their parent had been dead, they would have taken his share; yet as he was alive, it was impossible to hold that a child of a living parent could take any share, though it was clear they might have been made substantive objects of the appointment (*i*); and this case was followed in a subsequent case before Lord Kenyon, sent out of the court of Chancery (*k*), the certificate of the Judges in which case, was confirmed by the Lord Chancellor on the 18th December 1802.

And here, it may be remarked, that a gift to children in default of appointment is not confined to those only who are alive at the death of their parent to whom the power is given, but all the children take vested interests upon their birth, subject to be divested by the execution of the power; and therefore, the share of a child dying in the lifetime of his parent shall, in default of appointment, go to its representative. And the same rule would prevail as to other objects (*l*).

It seems doubtful whether, if one object be removed by the effect of advancement, the share shall go over under the provision in default of appointment, or whether it shall be considered as a purchase by the father at the sum advanced. This question arose in the recent case of Folkes and Western (*m*). Under the trusts of a term, trustees were to raise 4000*l.* for younger children's portions, to be paid, if more than one, as the fa-

(*i*) Routledge *v.* Dorril, 2 Ves. jun. 357.

(*k*) Legard *v.* Haworth, 1 East, 120; see Longmore *v.* Broom, 7 Ves. jun. 124.

(*l*) Vanderzee *v.* Aclom, 4 Ves. jun. 771.

(*m*) 9 Ves. jun. 456.

ther and mother, or survivor, should appoint; in default of appointment, as usual. Another 4000*l.* was settled in the same way. There were two younger children, both daughters: upon the marriage of one, the father gave her a portion, which, it was declared, should be a satisfaction of her claims under the settlement. The Master of the Rolls held, that, as the daughter had no definite interest, except in default of appointment, she had nothing that she could make the subject of a bargain with her father, he could not say that any definite proportion had sunk. If she had had a definite interest, it would, he admitted, have sunk, and therefore have been no charge on the estate. He thought then that the case could only be compared to the cases upon the custom of London, where the effect of advancement was merely to remove that child out of the way, and to increase the shares of the others, and not to increase the disposable part of the father's estate. This provision, he added, must have the same effect; removing the daughter, putting her out of the question altogether, as if there never had been such a child. Therefore, before the power ever arose, there ceased to be objects, for it was impossible the mother, who had survived her husband, could give any thing to the daughter advanced. That was expressly stipulated, and she was incapable of receiving any more than if she was dead. The consequence was, that one of two objects being removed, the other must of necessity take the whole.

This decision appears to be in direct opposition to a case not adverted to. I allude to Pitt and Jackson, or Smith and Lord Camelford (*n*), where money was di-

(*n*) 2 Bro. C. C. 51; 2 Ves. jun. 698.

rected

rected to be laid out in land, to the use, after the deaths of the husband and wife, of the children of the marriage as the father should appoint, and in default of appointment as the mother should appoint, with remainder, in default of appointment, to the children in tail. There were two children. The father, considering the money as not laid out in land, by his will gave rather more than a moiety of it to Ann, one child, and the remainder to Mary, the other child. After the will, and upon the marriage of Ann, he advanced her a large portion, and soon afterwards by a codicil revoked the legacy to her. And it was conceded by the counsel for Ann and her husband, and accordingly decreed by Lord Kenyon at the Rolls, that the legacy was well revoked, as the father was become a purchaser of that moiety by the fortune given to Ann upon her marriage. Upon a bill of review being filed to this decree, which involved other points, Lord Rosslyn held that the fund had been invested in the purchase of an estate, and that the appointment in the will of the fund could not be supported as an appointment of the estate. He considered therefore that the estate must go as in default of appointment: but as to Ann, he thought her father had satisfied all the interest that she could as a creditor set up in opposition to any act in his will, in regard to her provision under the marriage settlement. She was totally in his power by the portion given to her upon her marriage, *when her interest under the appointment was contingent and uncertain, in respect of the possibility of the existence of other children.* But he thought that even a well executed appointment could not take from Mary, the other daughter, one moiety, for though the father could entitle himself to all Ann

could claim, it could be only to *that* she could claim *absolutely* against the other daughter. He could not make an appointment in truth beneficial to himself.

It is to be lamented that this case, which carries with it the joint authority of Lord Kenyon and Lord Rosslyn, was not adverted to in the case of Folkes and Western, more especially as the latter case was decided by analogy to cases which do not necessarily bear upon it, and which are themselves not founded in reason; for it was admitted that in those cases one should think, *prima facie*, the effect of advancement by the father would be to increase that part of the estate of which he had power to dispose. Lord Rosslyn avoided the objection upon which the opinion of the court was grounded in Folkes and Western, viz. that the interests being contingent and uncertain, there was nothing that could be made the subject of the bargain, by holding the advancement to be a purchase of the child's share in default of appointment, or of what she should become entitled to under an appointment. The only objection to this construction appears to be, that where the power is given to the wife if she survive, the advancement circumscribes her power; for as the husband himself cannot appoint a greater portion to the child he has advanced than the child would take in default of appointment, as it would in fact be an appointment to himself, it seems equally to follow, that the wife could not appoint a larger share, lest such a power should open a door to fraud on the other child. But still the wife's power might well be held to remain, so as to enable her to give the same share to the daughter *unadvanced*, as she might have given to her if the other daughter had not been advanced, and the father's representatives must be content with the share which may be appointed by the wife

wife to the advanced daughter, or may be permitted to descend to her. The only infringement then on the mother's power would be this, that in case of disobedience, she could not deprive the unadvanced child of the share provided for it in default of appointment, but she would have the best possible hold on the obedience of the child, in the power which would still remain of increasing the portion given in default of appointment. Besides, if the curtailment of the power be an objection, it occurs with the greatest possible force on the rule as established by Folkes and Western, for there, by the effect of the advancement, it was holden, that the entire fund was at once given to the unadvanced child, and consequently the mother was deprived of all power over the fund. It would seem, therefore, that till the cases come again under the review of the court, it would not be safe in practice, to consider the case of Pitt and Jackson as over-ruled.

II. It remains only to observe, that where the whole, or even part of the fund is ill appointed, it goes according to its original destination in the event of there being no appointment. And therefore, a person to whom a specific share is well appointed, shall not be excluded from taking any of the unappointed shares (*o*). To guard against these decisions where *part only* of the fund is well appointed, in which case the intention of the person

(*o*) Menzey *v.* Walker, For. 72; Alexander *v.* Alexander, 2 Ves. 640; Pocklington *v.* Bayne, 1 Bro. C. C. 450; Bristow *v.* Warde, 2 Ves. jun. 336; Wilson *v.* Piggott, 2 Ves. jun. 351; Routledge *v.* Dorril, 2 Ves. jun. 357; Smith *v.* Lord Camelford, 2 Ves. jun. 698; Attorney General *v.* Ward, 3 Ves. jun. 327.

executing the power is generally defeated, it is usual to insert an express clause in instruments creating powers of appointment amongst several objects, as children, that no child to whom a share is appointed shall take any share of the unappointed part, until each of the other children shall have received a share equal to that appointed to him.

CHAPTER X.

OF POWERS TO LEASE.

We are now come to the last branch of our subject, of which much has been necessarily anticipated. It remains only to consider, 1, The general rules of construction applicable to this power; 2, *What* may be demised under different powers; 3, For what term; 4, At what rent; and, 5, Subject to what covenants and conditions.

SECTION I.

OF THE GENERAL RULES OF CONSTRUCTION APPLICABLE TO THIS POWER.

Lord Mansfield has truly observed (*a*), that of all kinds of powers, the most frequent is that "to make leases." For the encouragement of farmers to occupy stock and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy, to the best advantage, during his own time; and they who come after must suffer, by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is check-

(*a*) 1 Burr. 120, 121.

ed

ed with many conditions, to guard the successor, that the annual revenue shall not be diminished, nor those in succession or remainder at all prejudiced in point of remedy, or other circumstances of full and ample enjoyment.

Formerly a distinction used to be taken betwen a power to a stranger having a particular estate, and a power reserved by the owner of the fee, which latter it has been said is to receive a more liberal construction than the other. But this doctrine, which has so direct a tendency to introduce different decisions on the same words, appears to be completely exploded at the present day, although an opinion has prevailed that a power of leasing is to receive a more strict construction than any other power (*b*), and that equity cannot relieve against a defect in the execution of it. However, we have already seen that this relief is administered in proper cases (*c*), and the books abound with authorities in favour of the liberal construction of this power. Lord Mansfield, whose authority is generally quoted in favour of the rigid construction (*d*), seems merely to have meant that the power must not be abused (*e*). Lord Chancellor Cowper thought the power was to be taken strictly (*f*), but Lord Chief Justice Holt, in the same case, was of a contrary opinion (*g*). Lord Kenyon has decided, that the *intention of the parties* must govern in the construction of this power (*h*), and Lord Redesdale has shewn upon very solid grounds, that the power

(*b*) See Fitz. 219; 3 Vin. Abr. 431.
(*c*) *Vide supra*, p. 295.
(*d*) See 1 Burr. 121.
(*e*) Dougl. 573, 1 Blackst. 449.
(*f*) See 3 Cha. Rep. 73.
(*g*) Ib. 69, 70.
(*h*) 3 Term Rep. 675.

must

must receive as liberal an interpretation as a power of jointuring or any other power (*i*). In the construction therefore of powers of leasing, we may call in aid the rules established in regard to other powers.

The decisions upon leases by tenants in tail and ecclesiastical persons, under the statutes, have been said to apply with equal force to leases under powers in settlements; but this position is certainly not founded: in several instances those decisions even differ from each other, according to the words of the statutes upon which they severally arose. In the course of the ensuing inquiry it will appear generally how far those determinations apply to the subject before us.

Where a lease is granted which is void under the power, no acceptance of rent by the remainder-man can set it up; for, though an acceptance of rent may make a *voidable* lease good, it cannot make good a lease which was actually *void* at first (*k*). The acceptance of rent, however, *as rent*, may operate as an admission by the remainder-man that the lessee is his tenant, and in that case he is intitled to notice to quit. And, under some circumstances, equity would compel the remainder-man to grant a new lease.

Where the terms of the power are complied with, it is no objection that the lease is granted in trust for the lessor himself, for that is a question merely between the parties. It is just the same thing as betwixt the lessor and the successor, where *the legal tenant* is bound

(*i*) 1 Rep. T. Redesdale, 61; *vide supra*, p. 229.

(*k*) Jones *v.* Verney, Willes, 169; Doe *v.* Watts, 7 Term Rep. 82.

during

during the term in all requisite covenants and conditions (*l*).

Whether a power of leasing extends to all the persons intitled under the instrument creating it, or only to some in particular, depends not upon the place where the power is inserted, but upon the fair construction of the whole instrument taken together (*m*).

(*l*) Wilson *v.* Sewell, 1 Blackst. 617; Earl of Cardigan *v.* Montagu, App. No. 14; Taylor *v.* Horde, 1 Burr. 60.

(*m*) See Forster *v.* Graham, 2 Str. 961; 2 Barn. B. R. 341, 428.

SECT.

SECTION II.

WHAT MAY BE DEMISED UNDER DIFFERENT POWERS.

It is seldom that any question on this head arises at the present day, except upon wills unskilfully penned: for the power usually introduced in modern settlements, is to lease all the hereditaments comprised in the deed at the best rent, and if the mansion house, park, or any other part, is not intended to be leased, it is expressly excepted in the power. However, the cases must be stated, which have arisen in regard to the subject over which the power rides.

Where a power extends to lands *usually* letten, lands which have been twice or thrice letten are within the power (*a*), but land which has only been once letten is not, we are told, within the proviso, for *usus fit ex iteratis actibus* (*b*). And it is said, that if land has been let by a contract from year to year for three years, it is not within the power, for it is but one lease (*c*). But Lord Chief Justice Vaughan, upon citing this case of a single demise (*d*), said that he did not much insist upon it, for the words "*usually* demised" may be taken in two senses. The one, for the often farming or repeated acts of leasing lands, the other, for the common continuance of land in lease, for that is usually demised, and so, land leased for five hundred years long since, is land usually demised, that is in lease, though

(*a*) 2 Ro. Abr. 261, pl. 11, 12; Vaugh. 33.
(*b*) 2 Ro. Abr. 262, pl. 18.
(*c*) 2 Ro. Abr. 262, pl. 14; *contra* P. 2 Ja. B.
(*d*) See Vaugh. 28.

it

it have not been more than once demised, which, he justly added, is the more received sense of the words land *usually demised.* Indeed, the common sense of mankind must revolt at a distinction which considers lands leased for one hundred years, as not usually demised, because the term was granted by one deed, but allows land to come within that description which has been let for two years only, on two distinct lettings.

In the case of Tristram and Lady Baltinglass, the power was "to demise all or any of the premises which at any time heretofore have been *usually letten,* for the term of twenty-one years, reserving the rent thereupon now yielded and paid." The settlement was made in the twelfth of Jac. and the jury found the lands in question to have been demised in the twelfth of Eliz. for twenty-one years, and that term was expired, *and they had not been demised for the space of twenty years before the settlement.* And the court held that they were not within the power. The word *usually,* excluded demises at a great distance of time, and the words "any time" in this case meant, "at *all* times." And what was not farmed twenty years before, could not be said to be at any time before commonly farmed, for those twenty years was a time before, in which it was not farmed. And the power requiring the rents *then* reserved, to be made payable, necessarily implied, that the land demisable under the power, was land, which was then under rent (*e*). The case of Foot *v.* Marriot (*f*), which was a case to the like effect,

(*e*) 2 Jo. 27, Vaugh. 28, 1 Freem. 23. As to the last ground *vide infra.*

(*f*) 3 Vin. Abr. 429, pl. 9.

was

was decided the same way by Lord Chancellor King, assisted by Lord Chief Justice Raymond, Mr. Justice Denton and Mr. Baron Comyns, simply upon the authority of Tristram and Baltinglass.

This last case we must observe, did not decide *affirmatively*, that land demised within twenty years, was subject to the power, but merely, that land not demised within that period was not subject to the power. It remains to be decided within what period the land must have been demised. The courts might probably incline to fix twenty years as the limit, by analogy to the enabling statute of 32. H. 8. c. 28, which in a similar case considered that as a reasonable period.

Upon this statute it has been very properly determined, that the lettings to which it refers, are by some person seised of an estate of inheritance, and not by tenant by the curtesy, dower, &c. (g) But the same doctrine cannot be applied to powers in private settlements, although a contrary opinion has been entertained. The act of Henry was intended to have a general and perpetual operation, it was therefore absolutely necessary to establish by whom the lettings must have been made, so as to authorise subsequent demises, and it would have ill accorded with the true spirit of the act, to have holden that demises by persons having partial interests only, constituted the standard to which the statute refers. But in the case of a power raised by a private settlement, the party creating it must be considered to know that the lands have been in lease, and by whom the leases were granted, and therefore, when he authorises the lands *usually demised* to be leased, to what can he

(g) Co. Litt. 44, b. Dy. 271, b. pl. 28.

refer, unless to the leases which have been theretofore actually granted. If he disapprove of any lands being let, which usually have been leased, it behoves him to expressly declare his intention by excepting them out of the power.

Upon the construction of the words *usually demised*, it has been determined that they embrace every species of demise—at will, from year to year, or for years or lives, and whether granted by parol or by deed, by copy of court roll, covenant to stand seized, or any other instrument (*h*).

We have before seen that one point relied on in Lady Baltinglass's case, was, that the *rent then reserved* was to be made payable, which the court thought necessarily implied, that the land demisable under the power was land, which was *then* under rent (*i*). And in Lord Mountjoy's case, where it was declared by a private act of parliament, that no alienation should be made but only leases, &c. "yielding the true and ancient rent," it was determined that land could not be leased, which had never been demised before. For how, it was asked, could a rent be called *the true and ancient rent*, when it issued out of a thing which was never charged with any rent by any reservation before (*k*)?

So in the case of Bagot and Oughton which underwent great consideration, the power was to lease, "*all*, or any of the premises, *at such yearly rents or more as the same are now let at*," and a lease was made

(*h*) Co. Litt. 44, b. Baugh *v.* Haynes, Cro. Jac. 76, S. C. 6 Rep. 37, nom. Dean and Chapter of Worcester's case, S. C. Mo. 759, nom. Banks *v.* Brown; Right *v.* Thomas, 3 Burr. 1441, 1 Blackst. 446.

(*i*) *Supra* p. 474

(*k*) 5 Rep. 3, b. Mo. 197.

of

of the capital mansion house, which was the family seat, and the demesne lands which were never leased before. And it was determined, principally on the authority of Lady Baltinglass's case, that the lease was void, although it was forcibly argued, that *all* the lands were authorised to be leased, and the subsequent words were only explanatory of the first part of the sentence, "that the lands usually let, may be let at the usual rent" *(l)* (1).

Lord Mansfield, addressing himself to this case, observed, that (*m*) the nature of the thing shewed that the power could not be meant to extend to letting the ancient manor house at all; much less to letting it without reserving any rent. In a family settlement of an estate, consisting of some ground always occupied together with the seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly excludes the mansion-house, and lands about it, never let. No man could intend to authorise a tenant for life to deprive the representative of the family of the use of the mansion-house. The words, in such a case, shew, that the power is meant to extend only to what has been usually let. By that means the heir enjoys all the premises in the settlement, just as they were held and enjoyed by his ancestor, the tenant

(*l*) 8 Mod. 249; Fort. 332. (*m*) Dougl. 573, 574.

(1) This decision is said to have been affirmed in the house of Lords; but the case is not in Brown; and, after a diligent search, I have not been able to meet with it amongst the printed cases of that period.

for life: He has the occupation of what was always occupied, and the rent of what was always let. The court, Lord Mansfield added, all, therefore, agreed, as to the rectitude of the decision in Bagot *v.* Oughton. The nature of the thing spoke the intent, as forcibly as the most direct words could have done. It was demonstration.

In the last case on this subject, a similar decision was made. A man, by his will, devised his estate in strict settlement, and gave a power to lease *all*, or any of the said manors, messuages, lands, tenements, and hereditaments, for lives or years, *so as the usual rents* were reserved. There were some tithes which were never leased before the making of the will, but some parts of the estate had been usually demised at rents; and the court considered Lord Mansfield's observations on Bagot and Oughton, to apply most pointedly to the case before them, as the tithes never had been let, but had always been occupied by the possessor of the estate; and they accordingly determined, that the power did not embrace the tythes (*a*).

But, in all these cases, the intention of the parties is to govern, and there are several instances in which parts of the estate never leased have, in favour of the supposed intention, been considered to be within powers, requiring the ancient or usual, or present rents to be reserved.

The first of these is Cumberford's case (*b*); where, under a power to make leases of the premises, or any

(*a*) Pomery *v.* Partington, 3 Term Rep. 665; and see accordingly, Foot *v.* Mariot, 3 Vin. Abr. 429, pl. 9; which case, although a very considerable authority on this head, has hitherto unaccountably escaped notice.

(*b*) 2 Ro. Abr. 262, pl. 15.

part

part thereof, "*so that* as much rent, or more, were reserved upon each lease as was reserved in respect of it within the 2 years immediately preceding," it was resolved, that lands which had not been leased within the 2 years at any rent, might be leased by the donee at any rent he pleased; because it appeared by the generality of the words, that it was intended he should have power to lease all the land. The court, therefore, considered the restrictive clause as applicable only to such lands as had been demised 2 years before.

Upon the authority of this case, as it should seem, the case of Waker, or Walker and Wakeman, was decided (*c*). A power was given in a settlement of an estate to demise the premises, (which consisted of land, a rectory, &c.) so as 5*s*. *an acre* were reserved for *every acre* of the land demised. The rectory consisted of tithes only, and no glebe; and it was adjudged, that the power authorised a demise of the land at 5*s*. per acre, and of what did not consist of acres, as the rectory, without rent. And, upon the same principle, Lord C. J. Holt delivered an extrajudicial opinion, that under a power to lease an estate comprising a manor, so as the leases were not made of the demesne lands, and so as the ancient rent were reserved, the rents and services might be demised *without rent*, because it appeared to be the intent of the settlement, that part of the manor might be demised; and, as the demesne lands were not comprised in the power, then the rents and services must be; for the whole of the manor consists in demesnes, rents, and services, and he said, *if a man hath a power reserved to*

(*c*) 1 Freem. 413; 2 Lev. 150; 1 Ventr. 294; 3 Keb. 544, 547, 586, 589, 619.

him of making leases of two things, and a qualification is annexed to the power which cannot extend to one of these things, he may make a lease of that thing without any regard to the qualification (1). And he relied upon Cumberford's and Waker's cases as authorities for these positions; but Turton and Eyre J. thought, that as there were other lands mentioned in the power, they satisfied the words of it (*d*).

In the case of Goodtitle *v.* Funucan (*e*), the power in a settlement of manors, fishery, &c. was to demise all or any of the manors, *fisheries* (*f*), messuages, lands, tenements, and hereditaments therein before-mentioned, *so as there were reserved so much rent, or more than then was paid for the same.* The manors, or manorial rights, had not been let before. The fishery had been let before, but was not at the time of the settlement; since that time, it had been again let at 15*s.* a year. A lease was made under the power of the manors and *fishery*, and some lands, reserving the right of shooting and fishing, at a rent exceeding what they had ever produced before, about 30*l.*; and the court held the lease to be valid. Lord Mansfield, in delivering the judgment of the court, said, that the power was express to demise

(*d*) Winter *v.* Loveday, Com. 37; 1 Freem. 507; 1 Lord Raym. 267; 2 Salk. 537; Carth. 427; and see Campion *v.* Thorpe, Clayt. 99; Campbell *v.* Leach, Ambl. 740.

(*e*) Dougl. 565; see 1 Burr. 124.

(*f*) See 3 Term Rep. 671, n.

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(1) Lord C. J. De Grey quoted this rule in Campbell *v.* Leach. The passage in Ambler, p. 748, should be read thus: Where there is a power of leasing (with a description) applicable to some parts of the estates, and not to all of them, those to which it is (not) applicable, may be leased without such description. *Vide supra*, p. 290, n.

the

the manors and fisheries. They were particularly mentioned in the settlement, and the power went to the whole. They paid under this lease as great a yearly rent as at the time of the settlement, for they paid nothing then. The *words*, therefore, were complied with, and the objection could only stand upon the intent. But the court thought no such intent appeared. The manors were nominal, of no value, no object of yearly income. The fishery only worth 15*s*. a year. They were convenient to the lessee living on the land, and of no use to the remainder-man. The right of shooting and fishing was reserved to him. For his own part, he thought the intent was to give leave to demise all, reserving as much rent *in the whole* as had been paid before, and in fact, 30*l*. more had been reserved (*g*).

These cases must not be dismissed without observation. The decision in Cumberford's case has been referred to the *ita quod*, or *so that* in the power (*h*), and Waker's case was distinguished by the court from Mountjoy's, on the ground, that there the proviso was *disabling*, that no lease should be made but with ancient rent, whereas in the case before them the power was general and *enabling*, and the latter clause restrictive (*i*). But these subtleties (1) are now happily got

(*g*) And see 3 Term; Rep. 677. (*i*) See 3 Keb. 597.
(*h*) See Fort. 332.

(1) In treating a distinction between a *disabling* and an *enabling* power as a subtlety, I allude only to those cases where it turns merely on the form of the words creating the power, for certainly there is a wide difference between a power *disabling* a tenant in fee, from making any lease, but for a certain time, and a power *enabling* a tenant for life, to lease for the same period; vide infra.

rid of (*k*): the intention of the parties, to be fairly collected from the whole instrument, is the only guide to the true construction of the power. Upon this broad ground it was, that the case of Goodtitle and Funucan was decided. If then in these cases, we are to advert to intention, the value of the property must have considerable weight: for it is decided, that if the lands, tithes, &c. to which the restriction does not apply, *are* within the power, they may be leased for the term prescribed without rent. The mischievous consequences of this construction are evident. The intention of a settlement may be entirely defeated by it. The donee may lease lands, not letten before, without rent, taking a large fine at the expense of the remainder-man, whereas, in regard to those before letten, he is compellable to reserve the ancient rent. How incongruous and absurd is this rule, and how little calculated to effectuate the intention of the parties! Waker's case appears to have been decided solely on the authority of Cumberford's case, and Lord Chief Justice Hale, said that *if* it had been *res integra*, perhaps he should have been of another opinion (*l*), and Mr. Justice Barclay, seems to have entertained the same sentiments (*m*) and in the great case of Foot *v.* Marriot, Lord Chancellor King adopted Hale's opinion of Cumberford's case, and added that *if* the case were law it should not be carried one step further (*n*). In all the modern cases, the judges without expressly over-ruling Cumberford's case, have clearly evaded the *spirit* of the decision. If the cases of Bagot and Oughton, Foot and Marriot, and Pomery

(*k*) See 3 Term Rep. 677.
(*l*) See 2 Lev. 151.
(*m*) 3 Keb. 596.
(*n*) 3 Vin. Abr. 429, pl 9.

and

and Partington are well decided, it is still open to contend, that the property to which the restrictive clause cannot apply, shall, if valuable, be rather held not to be within the power, than that the first tenant for life shall be authorised, contrary to the intention of the donor, to decrease the rental of the estate for his own particular emolument. The rule laid down by Holt that "where a man hath power reserved to him of making leases of two things, and a qualification is annexed to the power, which cannot extend to one of these, he may make a lease of that thing without any regard to the qualification, may be a sound rule, but the question in these cases, is, whether the qualification does not form a part of the sentence, and virtually exclude that subject to which it is admitted it cannot extend. There are however, cases to which the rule ought to be applied. As if in a power to lease estates, including mines opened and unopened, a clear intention appears to embrace all the mines, but a clause is added that no lessee shall be made dispunishable of waste, there to effectuate the general intention of the power, the latter clause should not be deemed applicable to the unopened mines(*o*), so if a similar clause should be inserted in a power to grant leases at rack rent and building leases, it should be construed to extend to the leases at rack rent only, as no improvements by building could be made, unless old buildings could be pulled down, trees felled, &c. Indeed, it even seems that such a clause in a power to grant building leases only, would

(*o*) See and consider Campbell *v.* Leach, Ambl. 740, and keep in remembrance that it is not waste to work open mines, Co. Litt. 54, b.

not restrain the liberty of pulling down the old buildings, in order to erect new ones (*p*).

Where leases are granted under powers to lease lands usually demised, it must be shewn, by old leases or other satisfactory evidence, that the lands have usually been demised, or they cannot be supported (*q*).

In the case of Campbell *v.* Leach (*r*) it was determined that under a power to lease the "messuages, lands, tenements and hereditaments," in the deed (except the capital messuage and warren) at the best rent, opened mines might be leased as they were in lease at the time of the settlement, and twelve years then to come of the term, and must be understood to have been settled for the benefit of all claiming under it, and the words were sufficient to carry the mines.

The usual power of leasing for lives authorises a lease during co-existing lives only (*s*). And where a power is limited to lease for any given number of lives, such parts of the estate as are demised for *any such time*, it does not include lands which were then demised for lives, not concurrently but successively, and by way of settlement (*t*).

In the case of Winter *v.* Loveday, it was determined by Holt Chief Justice, Turton and Eyre, against Rokeby, that an exception in a power of leasing, of the demesnes of a manor, included the copyholds of the manor. Rokeby thought that the exception extended only to lands in the occupation of the donor. He, however, held that, if the demesne lands had *not* been excepted

(*p*) *Vide infra.*

(*q*) See Earl of Cardigan *v.* Montague, App. No. 14.(6).

(*r*) Ambl. 740.

(*s*) *Vide infra* Sect. 3, div. 4.

(*t*) Doe *v.* Halcombe, 7 Term Rep. 713.

by

by express words, yet the power of leasing would not have extended to them, for if it did, it would destroy the tenure, because copyhold lands once leased are for ever enfranchised, and therefore, it shall never be presumed that the tenure was intended to be destroyed without express words of the parties for that purpose (*u*). This is an important general rule of construction applicable to every power.

(*u*) Carth. 428, *et sup.*

SECTION III.

OF THE TERM WHICH MAY BE GRANTED.

Some of the cases on this head have been unavoidably treated of in a former part of the work (*a*). We may here inquire, 1. in what cases leases in possession only, can be granted; 2. in what instances leases in reversion may be granted; 3. whether concurrent interests can be granted under the usual power of leasing; and 4. for what lives the estate may be granted, under powers to lease for lives.

I. And first, in all well drawn powers of leasing, where it is intended that a lease in reversion may be granted, it is expressly declared so; and if a reversionary lease is not to be granted, it is expressly declared that the lease shall be made to take effect in possession, and not in reversion, or by way of future interest. But it has been determined, that even a general power to lease for a certain number of years, without expressing that the leases shall be in possession, and not in reversion, authorises leases in possession only, and not in reversion or *in futuro*, for if by the power, a reversionary lease might be made, then a lease for the years authorised might be made in possession, and afterwards infinite leases for the same term in reversion, which would be contrary to the meaning of the power, and would render idle and vain the express limitation in the power of the number of years for which the lease might be granted (*b*). And

(*a*) Vide chap. 9, sec. 2.

(*b*) Countess of Sussex *v.* Wroth, Cro. Eliz. 5; S. C. cited 6 Rep. 33 a, nom. Leaper *v.* Wroth; Shecomb

And it seems to have been settled after considerable doubt, that where the power is expressly to lease *in possession,* a lease in reversion cannot be granted, although the estate is in lease *at the time of the creation of the power,* so that unless a present lease can be granted of the reversion, the power is in suspense till the determination of the first lease (*c*).

II. But in the foregoing case it was laid down by Windham and Twisden, that if the power had been to lease generally without saying *in possession,* a lease might have been made to commence at the end of the lease then *in esse.* And the same point was expressly decided in the Marquis of Northampton's case by Manwoode and Dyer against Mounson, but by the marginal note in Dyer, Lord Chief Justice Treby (II), appears to have agreed with Mounson (*d*); and in the case of Baynes

Shecomb *v.* Hawkins, Cro. Jac. 318, 1 Brownl. 1481, Yelv. 222, nom. Slocomb *v.* Hawkins (1).

(*c*) Opy *v.* Thomasius, 1 Lev. 267, Raym. 132, 1 Keb. 778, 910; and 1 Sid. 260, where it was admitted that the lease was void; but see 4 Mod 6, and see Marquis of Antrim *v.* Duke of Buckingham, 1 Cha. Ca. 17, 1 Sid. 101. S. P. acc. and see and consider Sands *v.* Ledger, 2 Lord Raym. 792.

(*d*) Dy. 357. a, 2 Ro. Abr. 261. pl. 8, 1 Leo. 36 cited; loosely reported in 3 Leo. 71 (III).

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(1) As this case is reported in Cro. Jac. the first lease was granted *before the power was created,* and Brownlow's report seems the same way: but if so, the decision was perhaps doubtful, *vide infra.* Yelverton states it otherwise. At any rate, the principle in the text was clearly admitted. In Raym. 133, it is said *arguendo* that the record of the case does not warrant Croke's report.

(II) The marginal notes in Dyer are understood to have been his production.

(III) Note—The report in Leonard does not state both the leases to have been granted under the power; and Dyer, before whom the cause

was

Baynes v. Belson (e), the court delivered an extrajudicial opinion that such a lease was void, although certainly they appear to have relied on the cases where the land was in possession as authorities in point (1). But in the modern case of Coventry and Coventry (f), leases in reversion under a general power to demise an estate in lease at the time of the settlement, were sustained after many arguments. The ground of the decision is not, however, stated, and the case, perhaps, turned on the particular penning of the power, which was with a "so as there be not in any part of the premises so leased at any one time any more or greater estate or estates than for twenty-one years or three lives, or for any number of years determinable on three lives," and upon the old leases and the reversionary lease there were not at any one time upon any of the lands demised more or greater estates than estates for years determinable upon three lives: the court therefore might well have relied on this clause as evidence of the intention that leases in reversion might be granted, so as with the leases in possession they did not exceed the limits pointed out. It seems far from clear that at the present day a lease in reversion would be supported under a general power, al-

(e) Raym. 247; and see Berry v. Riche, *infra*. (f) 1 Com. 312.

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was tried, and whose accuracy may be relied on, states *expressly* that the first lease was granted before the creation of the power. Indeed the point cannot be doubted, as Dyer gives the date of the first lease which was three years previous to the creation of the power.

(1) It is far from clear upon the face of the report, that any lease was in existence at the time of the settlement, and from the cases relied on, it should seem that the fact was not so.

though

though the estate was in lease at the time of the settlement, unless there were some direct evidence as in Coventry *v.* Coventry of the intention of the parties. Such a construction, it must be admitted, would, in most cases, ill accord with the intention of the parties (i). It might upon the same principle perhaps be contended that a remainder-man may, under a general power, grant a reversionary lease of an estate, leased by a prior tenant for life, under the same settlement.

A power to grant a lease may, by the particular wording of it, authorise a lease in reversion, although not so expressly stated, and the estate is not in lease at the time of the creation of the power: Thus where the power was to lease for any number of years, not exceeding ninety-nine years, *from the time of making*

(i) I should do wrong to pass over the principle which Mr. Powell has extracted from the case of Fox *v.* Prickwood, 2 Bulstr. 216, 1 Ro. 12, Cro. Jac. 349, 2 Ro. Abr. 260, pl. 5, as it would if established, be a very important one. It is this. "If," says Mr. P. "there be a power to make leases *in possession* expressly, which attaches upon an estate part of which is in possession, and other part thereof in reversion at the creation of the power; the donee of the power may *immediately* make leases *in possession* of the estate in reversion, as well as of that in possession." Pow. Powers, 425, 426. No such principle however was established by that case. The estate was limited to a stranger for a valuable consideration for fifteen years, remainder to the owner for life, with a power to make leases *in possession*. And the only question was, whether he could make leases till *his own estate for life*, came into possession by the expiration of the fifteen years, and it was holden that he might. The other question could not arise, for although the estate demised, was in lease at the time of the settlement, yet it is expressly stated that, that lease had expired before the new one was granted, and the court considered it clear that a lease in reversion could not be granted.

the

the demise, it was adjudged that the latter words did not refer to the commencement of the lease, but only restrained the making of a lease for more than ninety-nine years from the making, and that a lease might be made for sixty years to commence twenty years afterwards, for it would not exceed ninety-nine years from the time of making the demise, the true construction of the power was, that he might lease for ninety-nine years, from the time of making the lease, or for any other term not exceeding ninety-nine years (*g*).

Although a power enable a man to make leases in reversion, as well as in possession, yet he cannot make a lease in possession, and another lease in reversion of the same land, but his power to make leases in reversion, shall be confined to such land as was not then in possession (*h*).

And the very same expression, *lease in reversion* may have a different signification in the same conveyance, being applied to a lease for life, it shall be intended of a concurrent lease, or a lease of the reversion, viz. a lease of that land which is at the same time under a demise, and then it is not to commence after the end of the demise, but hath a present commencement, and is concurrent with the prior demise, and this construction is imperiously called for, as a lease for life cannot be made to commence at a future day (*i*), but being applied to a lease for years, it shall be intended of a lease which shall take its effect after the expiration or determination of a lease in being (*k*).

(*g*) Harcourt *v.* Pole, 1 And. 273.
(*h*) Winter *v.* Loveday, 1 Com, 36, Per Holt,
(*i*) Whitlock's case, 8 Rep. 69, b.
(*k*) 1 Com. 39 b, Per Holt.

Thus

Thus we have seen in what cases, leases in possession and leases in reversion may be granted. It is still necessary to ascertain what the law understands by leases in possession, and what by a lease in reversion.

Lord C. J. Holt has thus explained the nature of a lease in reversion. In the most ample sense, that is said to be a lease in reversion, which hath its commencement at a future day, and then it is opposed to a lease in possession, for every lease that is not a lease in possession in this sense, is said to be a lease in reversion (*k*); but the usual construction of the term *lease in reversion* in powers, is a lease to commence after the end of a present interest in being (*l*), and not a lease to commence at a future day.

In common parlance, a lease is said to be *in futuro* when it is granted at a day to come, and is not dependent on a subsisting prior lease; and it is termed a lease *in reversion* when it is to take effect after a prior subsisting interest.

Where a lease ought to be granted in possession, a lease made to commence only a day after the date of the deed creating it, is as fatal a variance from the power as if made to take effect at the expiration of 100 years from the time.

It has long been settled, that a lease to hold "from henceforth," "from the making," "from the time of the delivery of the indentures," or "from the sealing and delivery of the deed," is a lease in possession, and not *in futuro* (*m*), and it shall begin from the delivery,

(*k*) 1 Com. 38; and see Cart. 14, 15; 2 East, 383.

(*l*) 1 Com. 38.

(*m*) Clayton's case, 5 Rep. 1; Higham v. Cole, 2 Ro. Abr. 520, pl. 1.

where

where no time is mentioned (*n*); and "from the date" has in these cases the same meaning (*o*), although certainly this opinion has not always prevailed (*p*).

And nice as the distinction may seem, the words "from the day of the date," were, by a series of decisions prior to the famous case of Pugh and the Duke of Leeds, holden to be exclusive, and to render the lease a lease *in futuro*, and consequently void. Amongst these decisions several modern ones may be ranked, which underwent great consideration (*q*), and even two cases before the very same Judges who decided Pugh and the Duke of Leeds (*r*).

In that case, however, after a full review of all the authorities which Lord Mansfield, in delivering the judgment of the court, declared to be so many contradictions backwards and forwards, it was decided, that "from the *day* of the date" was the *same* thing as "from the date," and consequently that a lease to hold "from the day of the date," was a valid lease under a power to lease in *possession* only. The principal ground of the decision was, that "from" might mean either *inclusive* or *exclusive*: that the parties necessarily understood and used it in that sense, which made their deed effectual: that courts of justice are to construe the words of parties so as to effectuate their

(*n*) Co. Litt. 46, b.

(*o*) Osborn *v.* Rider, Cro. Jac. 135; Hatter *v.* Ashe, 3 Lev. 438; 1 Lord Raym. 84.

(*p*) See Clayton's case, 5 Rep. 1; Bacon *v.* Waller, 1 Ro. 387; 2 Ro. Abr. 520, pl. 4; and see Co. Litt. 46, b.

(*q*) Denn *v.* Fearnside, 1 Wils. 176; Attorney General *v.* Countess of Portland, Cowp 723, cited; and see Freeman *v.* West, 2 Wils. 165.

(*r*) Hotley *v.* Scot, Lofft, 316; Doe *v.* Watson, Cowp. 189.

deeds

deeds and not to destroy them, more especially where the words themselves abstractedly may admit of either meaning *(s)*. In a subsequent case before Lord Kenyon, upon the word "from" in an *indictment*, in which the case of Pugh *v.* Duke of Leeds was cited, he said, that it was not applicable to the case before him, and that it must be remembered, that though he believed that case was rightly decided, the contrary determination had before been made by all the Judges. Mr. Justice Ashurst observed, that the case of Pugh *v.* Duke of Leeds was properly decided, but that it turned on the construction of a contract between two persons where their intention was to be considered *(t)*.

Mr. Powell, in an elaborate argument, which occupies upwards of 100 pages, has shewn very successfully that this decision was in direct opposition to the decided cases *(u)*; but however we may dread the precedent which this case sets for similar innovations, yet, as the mischief to be apprehended from the removal of land marks, must in this instance have already been sustained, it cannot be expected, nor is it to be hoped, that a decision which has so much good sense for its basis will ever be over-ruled. No one, however, would be so rash as to grant a lease to hold "from the day of the date," under a power to grant leases in possession; on the contrary, conveyancers *ex abundanti cautelâ*, always make the habendum "from the day next before the day of the date of the deed."

(*s*) Pugh *v.* Duke of Leeds, Cowp. 714.

(*t*) Rex *v.* Inhabitants of Gamlingay, 3 Term Rep. 513.

(*u*) Pow. Pow. 433—540.

It has sometimes happened that a lease, though dated back, and on the face of it appearing to commence *in futuro*, was not in truth executed till at or after the time when it was expressed to commence, and in such case the lease is a valid execution of the power, and may be supported as a lease in possession: for, a deed takes effect from its execution and not from the date of it, and therefore, if the time of the execution can be proved, the lease cannot be defeated (*x*).

Under a power of leasing, a binding *contract* for a lease may be entered into (*y*); and if a *bonâ fide* contract be entered into to grant a lease at a future day, it will not be deemed a lease *in futuro* against the remainder-man, if the person agreeing to grant it live beyond the time limited for its commencement, although he die before it is actually granted, for every contract must necessarily precede the execution of it (*z*).

The foregoing cases arose upon leases *in futuro*. In regard to leases *in reversion*, it has been decided, that, where the lease is to take effect in possession, it will be good, although the estate is in the possession of tenants from year to year, or at will, provided they, at the time the lease is granted, receive directions to pay their rent to the lessee. This was decided in the case of Goodtitle *v.* Funucan (*a*). The lessees at will, and from year to year in that case, had attorned to the lessee under the power; and, at the trial before Eyre Baron

(*x*) Campbell *v.* Leach, Ambl. 740; see Hall *v.* Cazenove, 4 East, 477.

(*y*) *Vide supra*, ch. 6. sect. 1. div. 11.

(*z*) Shannon *v.* Bradstreet, Rep. T. Redesdale, 52.

(*a*) Dougl. 565.

at

at Nisi Prius, he left it to the Jury whether the attornment of the occupiers to the defendant, in consequence of the directions given them at the time of making the indenture, did not amount to a surrender by them, and whether they were not to be considered as having become thereby parties to the lease, and as having put the defendant in possession; and the Jury were of that opinion, and found a general verdict accordingly. A rule for a new trial having been granted, it was insisted against the lease, that the lessor could not have brought an ejectment against the lessees in possession at the time of the demise, and therefore had no immediate possessory right. But to this three answers were given. The first, that the tenants agreed to this lease, and surrendered their possession before the execution of it, in order to make it valid: The second, that if the jury had *not* found the defendant to have been in possession, this would have been good as a concurrent lease (*b*): The third, that in respect of the power, all the subsisting leases were leases at will. There was no outstanding lease as against the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately. And, upon these grounds, the court were all of opinion against the objection.

In deciding the foregoing case, the court did not state upon which of the three grounds their judgment was founded; but the first appears to be the true principle to which it must be referred. And it even seems that an actual lease under the power, if in fact given up at the time of the execution of the new lease, might

(*b*) As to this point, *vide infra*, S. 3.

be presumed to be surrendered in support of the new lease, and at least in a *bonâ fide* case, where the lessee is in the nature of a purchaser, equity would relieve against the want of a surrender *(c)*.

And of course, if the new lease be made to the person in possession under the old lease, it will, without any actual surrender, operate as a surrender in law of the old lease, and so no objection on this head will lie to the new lease. But where the second lease does not pass all the interest which it purports to grant, as if it be void because the best rent was not reserved, there it will not operate as a surrender of the prior term, although it may take effect by estoppel during the life of the lessor; nor in these cases is it material that the first lease is cancelled, as cancellation at this day will not amount to a surrender in law of a lease *(d)*.

Where a tenancy from year to year has expired, a lease in possession may be duly granted *(e)*, although the old tenant has a right to depasture the meadow, &c. till a future day *(f)*.

In the case of Doe *v.* Lady Cavan *(g)*, a lease was in existence under a power of leasing, and a further term was granted under the same power to the person in whom the first lease was vested, and the terms did not exceed together the number of years for which leases were authorised to be granted. It was confidently hoped that the second lease would be considered merely

(*c*) Campbell *v.* Leach, Ambl. 740.
(*d*) Roe *v.* Archbishop of York, 6 East, 86, and the cases there cited; to which add Lowther *v.* Troy, Irish T. Rep. 198.
(*e*) See Doe *v.* Calvert, 2 East, 376.
(*f*) See Doe *v.* Snowden, 2 Blackst. 1224.
(*g*) 5 Term Rep. 567, affirmed in Dom. Proc. 1795; see printed cas. and 6 Bro. P. C. by Toml. 175.

as

as a continuation of the first. The case, however, was disposed of without argument, as it appeared that the rent reserved was not the rent required by the power; but the Judges appear to have considered the first objection also as fatal.

It is no argument in favour of a lease *in futuro*, or in reversion, under a power to lease only in possession, that the donor of the power himself leased the estate in that way, or that lands are always so leased according to the custom of the country (*h*). And although part of the lands are leased in possession, yet if the lease is entire it is wholly void (*i*).

Before closing this head, it may be observed, that where a power authorises leases for any given term, as for twenty-one years, or for any term of years not exceeding the prescribed number, a lease may be made for the term, with a proviso, that upon the tender by the donee of the power of one shilling, or the like, the lease shall become void (*k*); or in other words, a lease may be made for a term certain, with a proviso determining it on a given event, at the option of the lessor.

III. Thirdly, *As to concurrent leases.* Upon the statute 1 Eliz. c. 19, which restrained bishops from making leases for more than twenty-one years, it has been solemnly decided, that a concurrent lease made to take effect in possession is good (*l*). And in the case of Read *v.* Nashe, in the 31st of Eliz. (*m*), under a power

(*h*) Doe *v.* Calvert, 2 East, 376.
(*i*) Doe *v.* Calvert, *ubi sup.*
(*k*) Earl of Cardigan *v.* Montagu, App. No. 14. (1).
(*l*) Fox *v.* Collyer, 1 And. 65, pl. 140; Mo. 107, pl. 251.
(*m*) 1 Leo. 117.

in a will to lease for twenty-one years, the donee leased for that term, and then a year before the expiration of the lease, he made a new lease for twenty-one years, to another person to begin *in presenti*. And it was argued that although he could not make leases in reversion, yet such a lease as this he might make well enough, for this lease was to begin presently, and so, no charge to him in reversion, and the inheritance was not charged in the whole with more than twenty-one years. And Serjeant Newdigate in arguing the case of Edwards v. Slater in the 17th of Charles the II, vouched a case of Berry and Riche in the common pleas, where it was adjudged that if a man has a power to make a lease for years, where there is another lease in being, there, if he make a lease to commence *in presenti* the power is well executed, and the second lease shall continue so long as it may, taking effect in possession after the determination of the first lease (*k*).

One of the arguments we have seen in favour of the lease, in Goodtitle v. Funucan was, that it was good as a concurrent lease, and for this the case of Read and Nashe was cited. Lord Mansfield in giving judgment said, that the reason given was a strong one, viz. that the inheritance was not charged in the whole with more than 21 years. No authority he said, was cited against this case, nor any answer given to the reasoning in it. The words of 13 Eliz. c. 10 (1) he added as strongly

(*k*) Hard, 412.

(1) Note; the question in Fox and Collyer arose on the 1 Eliz. c. 19, and not on the 13 Eliz. c. 10.

requires

requires leases to be in possession, and not in reversion, as those in this or any of the common powers to tenants for life, yet in the case of Fox *v* Collyer, all the Judges held that an immediate lease for 21 years of premises, on which there was a subsisting lease for four years, was good. The 18 of Eliz. c. 11, restrained the right to make such concurrent leases to cases where the old lease had not more than 3 years to run (2). In a very recent case, decided by Grose, Lawrence, and Le Blanc J. an *obiter* opinion was delivered, that according to the case of Goodtitle and Funucan, a concurrent lease might be granted under a power to lease in possession. This opinion was not pronounced on two leases *under the power*, but in a case where the first tenancy was not created by force of the power, and consequently was not binding on the remainder-man.

Thus stand the authorities in favour of concurrent leases: as the doctrine owes its foundation to the case of Fox and Collier, it may be proper to open the other side of the question, with some observations on that case. At the common law, a Bishop could not make any lease without the confirmation of his Dean and Chapter; the stat. of 32 H. 8. c. 28, *enabled* bishops, of their own authority, to make leases for 21 years, under certain restrictions, but this did not prevent them from granting the possessions of their sees for any term, with proper confirmation. Elizabeth, upon her accession to the throne, after the sanguinary reign of Mary, found the principalities of the church filled by Roman Catholics. These she resolved to remove, and justly apprehending

(2) Note; this act did not affect the 1 Eliz. c. 19.

that they would charge the bishopricks in their own favour, caused the stat. of 1 Eliz. c. 19, to be passed, whereby it was enacted, that any estate made by bishops of hereditaments, parcel of their bishopricks, "other than for the term of 21 years, or 3 lives from such time as it should begin, and whereupon the old rent should be reserved, &c." should be void. In Fox and Collier, the 2d lease was duly confirmed by the dean and chapter, for it was not authorised by the 32 H. 8. And the only question was, whether it was rendered void by the statute of Eliz. and it was determined that it was not, because it was not either within the letter, or the intent of the statute, not within the letter, as was clear by the words, nor the intent, because it was not prejudicial to the successor, inasmuch as he would have two rents, that is one by estoppel, and the other in interest, where he had but one before, and the intent of the statute is satisfied, if there is no longer estate against the successor than 21 years or 3 lives.

This case however was decided against the opinion of Lord C. J. Dyer, and Mead J. and also of Plowden, and has never been received as a satisfactory decision, although under the authority of it, bishops, at this day, constantly grant concurrent leases, with the proper confirmation. Mr. Justice Hutton, in the 1st of Chs. 1st, treated the case as ill decided, he said it was a resolution according to the very words, but without question, against the very intent of the makers (*l*). And Holborn, in his argument in Evans and Ascough in the 22 of Jac. 1 (*m*) well observed that the 18 Eliz. c. 11, was a parlia-

(*l*) Bishop of Chester *v.* Freeman, Ley, 78. (*m*) Latch 233, Palm. 457.

mentary

mentary judgment against the decision. And in the same case, Mr. Justice Doddridge observed, that a concurrent lease was very mischievous, and that the case of Fox and Collier was only carried by one or two voices of the judges (1). But Whitlock J. thought that not a reason to dispute it, and Jones J. agreed with him, and Whitlock seemed to think that the same decision ought to be made, if the point were *res nova*; and in the case of Thredneedle and Lineham (*n*), Ellis Justice thought the opinion of Mr. Justice Hutton was not to be put in balance with the resolution of the Judges in Fox and Collier. Windham J. however, seemed to think that the statute intended leases in interest only, and Lord C. J. Vaughan said, that the Judges had made a great strain upon the statute in Fox and Collier, and he treated a concurrent lease as not within the letter or the intent of the statute, because the statute intended, when a lease was once made, that on the expiration of it, the advantage should be to that Bishop in whose time it expired, and by this means there will, he added, be always a concurrent lease in being, and the successor can never make an entire lease, and though in pleading, men be estopped to say the party that made the latter lease had no power, yet this being found by verdict, the judges might judge according to truth, also the executors of the lessee are not bound by this estoppel, while the other lease, first made, lasts, and if so this lease is not for the successor's advantage, and so only good to some purposes, viz. pleading;

(*n*) 3 Keb. 372.

(1) This seems to have been admitted by all the judges, but see the report in Moore.

and in Shepherd's Touchtone, it is said, but no case is referred to, that in the case of a power to make leases for 21 years, if the party make more leases for 21 years, at one time than one, they are all void but the first; because it is against the intention of the parties, though it be not against the words (*n*).

By this time it will be admitted, that Fox and Collyer is not a case to rule others by analogy merely, and if any doubt arises on the doctrine in that case, as applied to the statute of Elizabeth, how much more forcibly must it arise when applied to leases under private powers. In that case, until the statute, the Bishop *pro tempore* might have aliened the land absolutely, with the proper confirmation, and still the concurrent lease is not valid without such confirmation. This therefore is a case in which the Judges may have been tempted to restrain a severe *disabling* statute, and they may have considered that the successor was only bound by a term of twenty-one years at most, upon which he was entitled to the old rent, whereas before the statute he might have succeeded to the land incumbered with a lease for two thousand years at a pepper corn rent. But how widely different is the usual power of leasing. It is an *enabling* power to a man who could not, of his own authority, make a lease binding on the estate for a single month, and it requires that the lease should take effect in possession, which clearly means not merely a term to commence *in presenti*, but also a term to commence in

(*n*) Shep. Touch, 269. If this book was, as is generally supposed, written by Doddridge, the above passage shews that he continued of the opinion he expressed in Evans v. Ascough, *vide supra*.

interest;

interest: the object of such a power is rather the benefit of the *estate* than of the particular tenant for life in possession, whereas in cases not expressly prohibited, the legislature intended to leave bishops in possession of their former rights. In the stat. of Eliz. the lease is not required to take effect in possession, and Whitlock, who we have seen, thought Fox and Collyer well decided, expressly distinguished it from a particular power of leasing. The argument of Mr. Justice Yates in Wilson *v.* Sewell (*o*), is still more to our purpose, he said that a lease *in being* is only that *in possession, a concurrent lease is not a lease in esse.* It operates only by estoppel. It passes no interest during the former lease. The 18 Eliz. meant to restrain leases in reversion, therefore by lease "in being," the legislature meant a lease in *possession.*

The advantage to be derived from the two rents which was relied on in Fox and Collyer's case is no other than a fruitful field of litigation. If the second lessee should enter and be ousted, as of course he would be, the rent on the second lease would, it should seem, be suspended. Or it may be thought that, as at this day leases are made by deed, the second lease would take effect by estoppel as a lease in possession, and attornement being now unnecessary, would carry with it the right to the rent reserved by the first lease, and then the remainderman's remedy for his rent would be more complicated and less effectual than it would have been under a single lease. And if it should be established that a concurrent lease may be granted, it will of necessity follow, that any indefinite number of concurrent leases may be granted of

(*o*) 1 Blackst. 126.

the

the same land, a doctrine fraught with too much inconvenience to be established on light grounds. It should seem, then, 1. That whatever may be the authority of the case of Fox and Collyer, it cannot be considered as ruling private powers; and 2. That a concurrent lease cannot be granted within the true spirit and meaning of such powers. As to the authorities in favour of the contrary doctrine, we may first ease the point of Berry and Riche cited by Serjeant Newdigate (*p*); for it is far from clear that that was not the case of a lease granted of an estate which was in lease at the time of the settlement; and the Serjeant refers to Moore's Rep. p. 618, which turns upon a very different question. The case of Read and Nashe, which Lord Mansfield relied upon as an authority, was never decided. It was merely the argument of Cooke at the bar, who produced no other authority than Fox and Collyer, and in Read and Nashe also the power was so particularly penned, that Cook occupied a considerable time to shew that a power was actually given. Lord Mansfield's observations in Goodtitle *v.* Funucan, appear to have been made without much previous attention to this point, probably from the circumstance that this was not the true ground of the decision (*r*), but was merely thrown in as an additional argument. The observation in Doe *v.* Calvert was a mere *dictum*, and rests solely for its authority on Lord Mansfield. Besides both these opinions may perhaps be supported on the third ground of Goodtitle *v.* Funucan, viz. that the first lease was not binding on the remainder-man, a case very distinguishable from one where both the leases are granted under the power. The point then is not sur-

(*p*) *Vide supra.* (*r*) *Vide supra*, p. 502, 503, and the notes.

rounded

rounded by much authority; and there seems reason to suppose, that if it should ever be argued on its true principles, the decision will be, that a concurrent lease cannot be granted. To guard against a contrary determination, it might be advisable in powers of leasing to expressly declare, that a concurrent lease shall not be granted. At any rate, where the best rent is required to be reserved, the point of enquiry, it is apprehended, would be the expiration of the first lease, and not the time at which the second is granted, and this would in some measure defeat the fraud upon the power which concurrent leases are mostly intended to effectuate.

But although a concurrent lease cannot be made, yet a surrender may be taken of the old lease, and a new one granted. If the new lease be made to the old tenant, an express surrender is of course unnecessary. It has indeed been doubted in practice, whether a new lease granted upon the surrender of the old one at an increased rent is valid. The increased rent, it has been argued, is equivalent to taking a fine at the expence of the remainderman; for if the old lease had been permitted to run out, a larger rent might have been obtained. There is not, however, any weight in this argument (*s*).

IV. Fourthly, *As to leases for lives.* A power to grant leases for two or more lives, implies an authority to grant them during the life of the survivor, although the power is silent in that respect (*t*). And it has been decided upon the 13 Eliz. c. 10, that a lease to one for three lives, and to three for their three lives, is the same thing within the intent of the statute, which restrains leases

(*s*) See Wilson *v.* Sewell, 1 Blackst. 617.

(*t*) Alsop *v.* Pine, 3 Keb. 44, pl. 16.

other

other than for three lives (*u*). The same construction would extend to a private power of leasing, but the lease must be made for lives *in esse* (*x*), and the lives must be concurrent; the candles, as the phrase is, must all be burning at the same time, although the power is to demise "for one, two, or three lives," which seems to import succession (*y*).

We have in a former place seen in what instances the lease must be for the lives directly, and where it may be for a term of years determinable on the lives (*z*).

(*u*) Baugh *v.* Haynes, Cro. Jac. 76.
(*x*) Raym. 263.
(*y*) Doe *v.* Halcombe, 7 Term Rep. 713.
(*z*) *Supra*, ch. 9, s. 2.

SECTION IV.

OF THE RENT TO BE RESERVED.

The questions in regard to the *rent* arise either upon the *quantum*, or the mode of reservation. Where a settled estate has been usually let on lives, the common power of leasing is upon fines, which as the lives or leases drop are considered among the annual profits (*a*). This is generally the case in Ireland, but it prevails only in a few counties in England. The power of leasing commonly introduced into settlements of estates in England, requires the best rent to be reserved, and expressly prohibits the taking of a fine. Whether the best rent *is* reserved, is a point to be decided by a jury (1). It is clear, that under a power to lease at rack-rent, improvements by the tenant, however valuable, will not authorise a lease at an undervalue (*b*), and if a fine be taken, the lease cannot be supported, not only because it is against the intent of the power, express or implied, but because it is evident, that *however considerable the rent*, it might have been increased if the fine had not been taken. In a case before Lord Redesdale, the tenant covenanted to lay out 200*l. in improvements*; and it was argued that this was equivalent to a fine, but his Lordship said, that he thought this would not avoid the contract if the rent

(*a*) See 1 Burr. 121.
(*b*) Roe *v.* Archbp. of York, 6 East 86; and see Doe *v.* Lloyd, 3 Esp. Rep. 78.

(1) As to the kind of evidence admissible in these cases, see Roe *v.* Rawlings, 7 East 279.

were

were notwithstanding the best that could be got. Such a covenant, he added, is not necessarily a fraud. It may be made with a fraudulent intent, and when it is so made it will avoid the lease; if it were colourable, and merely for the purpose of putting money into the pocket of the tenant for life, it would avoid the lease; or if it were not originally intended as a fraud, but were afterwards used fraudulently (as for example, a covenant to repair, and a sum of money under colour of damages for breach of that covenant recovered by the tenant for life) a court of equity would at least take care that the damages should be laid out on the lands (*c*).

We should however be cautious in the application of the principle of this decision to cases in practice. It should seem, that although the rent reserved be the full value of the land, yet if satisfactory evidence could be produced to a jury that a tenant was willing to give an additional rent in lieu of the money agreed to be laid out in improvements, the lease could not be supported. It would not be the *best rent* that could have been obtained. In these cases it is not essential that there should be fraud and collusion between the lessee and tenant for life. The simple question is, Is the rent the best rent? If it be not, the lease must fall to the ground, however fair the transaction (*d*).

And where, from the quantity and nature of the property demised, it is impossible to ascertain whether the rent reserved is the best rent, the execution of the power cannot be sustained, as where a donee of a power to lease at rack rent, leased an honour and sixteen ma-

(*c*) Shannon *v.* Bradstreet, 1 Rep. T. Redesdale, 52; and see Campbell *v.* Leach, Ambl. 740.

(*d*) See Wright *v.* Smith, 5 Esp. Rep. 203.

nors,

nors, and other estates, with a park and deer therein, by one lease at 600*l.* a year, the lease was deemed invalid by reason of the general, extensive, casual, and uncertain natures and values of the greater part at least of the premises, and the great difficulty, if not utter impossibility, arising from thence of forming any judgment, whether the rent thereby reserved was the best rent that could have been obtained (*e*).

Of course, in a power to grant building leases, the term *best rent* must, although not expressed, be understood to be the best rent which can be obtained with reference to the gross sum to be laid out by the tenant in building or improvements.

We have already seen, that the surrender of an existing lease, and the grant of a new one at an increased rent is not equivalent to taking a fine (*f*).

Formerly these powers required the ancient or usual rent to be reserved, but at the present day this practice is very properly exploded. Where such a term is introduced, the better opinion is, that as a general rule, the rent reserved at the time of the creation of the power, where a lease was then in being, or last before it, where no lease was then in being, is the rent to which the power must be taken to refer (*g*). But it is no objection that *more* than the ancient rent is reserved (*h*), nor that heriots or other *casual* and *accidental* services

(*e*) See Earl of Cardigan *v.* Montagu, App. No. 14. (2) Note; there was another objection to the lease.

(*f*) *Vide supra*, p. 509.

(*g*) See Morrice *v.* Antrobus, Hard. 325. 3 Cha. Rep. 66—68, accordingly per Holt, C. J.; but see ib. 73, *contra per* Lord Ch. Cowper; and see Right *v.* Thomas, 3 Burr. 1441, 1 Blackst. 446.

(*h*) See 3 Cha. Rep. 78.

which have been usually rendered, are *not* reserved by the lease under the power (*i*).

It should seem that where the usual rents are required to be reserved, and a certain sum was formerly paid, with a covenant by the lessee to pay all the taxes, a reservation of the like rent, without a similar covenant, would be a fraud on the power, for the new rent would only be nominally the ancient rent, as it would be subject to a deduction for the land-tax, and other taxes which would in effect reduce the rent below the sum anciently rendered (*k*).

The word *rent*, in powers of leasing, is, with great propriety, construed to mean not money merely, but any return or equivalent adapted to the nature of the subject demised; therefore upon a lease of mines, a due proportion of the produce may be reserved as a render in lieu of money, although the power requires a "rent" generally to be reserved (*m*).

II. When it is ascertained that the proper *quantum* of rent is payable, the next question is, whether the form of the reservation be proper.

Where the usual or ancient rent is required, it must be reserved in the way it has commonly been; if gold has been usually reserved, silver cannot be made payable in lieu of it: if it were commonly paid at four days, a reservation at one, two, or three days would be void, unless the power require the *yearly* accustomed rent to

(*i*) Baugh *v.* Haynes, Cro. Jac. 76, Mo. 759; Co. Litt. 44, b; Coventry *v.* Coventry, 1 Com. 312.

(*k*) See Earl of Cardigan *v.* Montagu, App. No. 14. (8); Goodtitle *v.* Funucan, Dougl. 565.

(*m*) Campbell *v.* Leach, Ambl. 740; Bassett's case cited, ib 748.

be

be reserved; in which case, the whole rent may be made payable at one time, or at several periods (*a*); but a difference of words is not material; therefore a reservation of eight bushels of grain in lieu of a quarter is good, because it is all one in quality, value, and nature (*b*); and a reservation of the rent *before* the usual day of payment is said to be valid, because payment before the day is payment at the day (*c*).

The strictness on this head has been carried so far, that it has been considered that two several farms not usually let together could not be joined in one demise, with a reservation of one and the same rent, nor a *parcel* of a farm rendering rent *pro rata* (*d*). But it has never been necessary to decide these points upon powers in private settlements, and it probably never may. The questions have generally arisen upon leases under the statutes by ecclesiastical persons, tenants in tail, and husbands seised *jure uxoris*; and notwithstanding the cases in the books, a lease of part at a rent *pro rata* was considered as valid by very able lawyers. And the doubt to the contrary has, so far as it relates to ecclesiastical leases, been removed by a late act of parliament (*e*); which act, very unaccountably, does not remove the doubt as to leases by tenants in tail or husbands seised *jure uxoris*, nor does it validate leases by ecclesiastical persons of two or more farms together, which have been usually let separately.

(*a*) 6 Rep. 38, a; Campbell *v.* Leach, Ambl. 740; see Earl of Cardigan *v.* Montagu, App. No. 14.

(*b*) Mountjoy's case, 5 Rep. 3 b; see 3 Cha. Rep. 75; 1 Burr. 121.

(*c*) See 2 Lord Raym. 1198; *sed qu. et vid. infra.*

(*d*) 5 Rep. 5 b; 3 Cha. Rep. 75; Smith *v.* Trinder, Cro. Car. 22.

(*e*) 39 & 40 Geo. 3. c. 41.

It is clear, however, that the mere circumstance of the rent being reserved out of the land, *and* recent improvements on it by building, will not vitiate the lease, although, as it has been argued, part of the rent issues out of the new buildings *(f)*. To prevent any doubt on these points, where powers are given to lease at the ancient rent, it should expressly be declared, that leases may be made of part at rents *pro rata*, and that lands usually demised by several leases at several rents may be demised by one lease at the aggregate of the old rents.

The rent to be paid should, in strictness, be specified in the lease; but although the reservation be made in the very words of the power without stating the sum in particular, the lease will be supported if the reservation have reference to some standard by which the rent can be ascertained with certainty and ease, for *id certum est quod certum reddi potest;* but if the reservation be vague and indefinite, and not easily reducible to a certainty, the lease will be void. As an instance of the first rule may be quoted, the case of Lewson *v.* Pigot (*g*), where, under a power to make leases of certain lands, reserving 12*d.* for every Cheshire acre, a lease was made of all the lands, "reserving all the rent intended to be reserved," and the lease was determined to be valid: because, Lord Chancellor Cowper observed, there was an absolute mathematical certainty, than which nothing can be more certain, the very power provided it should be so; at least 12d. for every Cheshire acre (*o*). It was only necessary, therefore, to

(*f*) Read *v.* Nashe, 1 Leo. 147.
(*g*) 3 Cha. Rep. 61 cited.
(*o*) See 2 Cha. Rep. 76.

compute

compute the number of acres in order to fix the rent (*p*); and in a recent case, where a tenant for life, with a power of leasing, contracted to grant a lease at the yearly rent of 7*l.* for every acre, the lands upon a proper survey to be had, should appear to contain, and so in proportion for every lesser quantity than an acre, the uncertainty of the rent, was objected against the performance of the agreement, but Lord Redesdale said, that he did not think it uncertain, for it was capable of being reduced to a certainty, and it was a common form of reserving the rent in the country where the land was situated. Every executory contract must contain this species of uncertainty, but if it contains all that leads to future certainty, he took it to be sufficient, and he accordingly decreed a specific performance of the contract (*q*).

The second rule is exemplified in the great case of Orby *v.* Mohun (*r*), where the power was to grant leases of all lands anciently demised at the ancient rents, and of the other lands at the best rents that could be gotten. The power was exercised by two leases, by one of which all the lands not anciently let, were demised, reserving thereon "*the best improved rents,*" and by the other, *all* the lands within the power were let, reserving the "*ancient and accustomable rents,*" so that instead of specifying the sums to be paid as rent, the words of the power were repeated, The cause was

(*p*) And see Audley *v.* Audley, 2 Cha. Rep. 82; but note there the power does not appear to have required the reservation of any rent.

(*q*) Shannon *v.* Bradstreet, 1 Rep. T. Redesdale, 52.

(*r*) 2 Vern. 531, 542, Prec. Cha. 257, 2 Freem. 291; but reported in 3 Cha. Rep. 56.

heard

heard before Lord Keeper Cowper assisted by the two chiefs, Holt and Trevor.

They unanimously agreed that the lease was void, as to the demesnes, as the remainder-man could not possibly tell what to demand, under the reservation of the *best improved rents.*

But as to the lands anciently demised, Lord Chief J. Holt, held that the rent was certain enough, and the lease good. It must be admitted, he said, that a power to lease, reserving the *ancient rent,* is a certain power, and well enough to be understood, what it is and what it means, and why he asked, shall the same words that create and reduce the power to a sufficient certainty, when turned into a lease render it uncertain. The same certainty that is in the power, is carried over into the lease, which is the execution of it, but neither in the one or the other is it mentioned what the old rent is, but that may be averred, and that is certain which may be made certain. But the Lord Keeper and Lord C. J. Trevor were of opinion, that the rent, even as to the lands anciently demised, was not certain, and that therefore, the lease was void. They argued, that as the intent of the settlement was (*s*), that the tenant for life in possession might lease; so it was on the other hand that the revenue should be diminished; but the antient rent at least reserved, and in such beneficial manner, as might with certainty, and without any difficulty be recovered; and for that reason, it was provided, that there should be a counterpart of the lease, that it might be better known what the rent

(*s*) 2 Vern. 543, 544.

was,

was, and how to recover it. If the rent had been mentioned in the lease, there if the tenant had refused to pay it, the proof would have been turned upon the tenant, to shew the rent in his lease was not the ancient rent, and if he should do so, it would make his lease void. But as the lease was contrived, the remainder-man might be baffled and nonsuited twenty times, before he could declare or avow in certain for the rent payable in the lease, and yet the tenant still holds the land, and doth not prove his his own lease void, as must have been done in the other case. Where there is a power of leasing in general words, as reserving the ancient rent; in the execution of the power which is to be explained and made certain, the rule, *certum est quod certum reddi potest,* is to be understood of a reference to that which is absolutely certain, to a former letters patent or the like: but this is rather a delegating the power of leasing to the plaintiff, than an execution of the power, and is the first attempt of the kind; and it is a good rule, that what never has been, ought never to be; and therefore they adjudged the lease to be void, and this decree was confirmed in the House of Lords (*t*).

Where the rent is required to be reserved at particular days, it must of course be reserved accordingly, but where merely the best *yearly* rent is required to be reserved, it may be made payable quarterly, or half yearly (*u*). It seems clear that the rent cannot be reser-

(*t*) 3 Bro. P. C. 248, nom. Dutchess of Hamilton *v.* Mordaunt, and see Owen *v.* Thomas, reported Cro. Car. 94, 3 Keb. 380 cited.

(*u*) Campbell *v.* Leach, Ambl. 740; 6 Rep. 38, a. See Earl of Cardigan *v.* Montagu, App. No. 14.

ved

ved *after* the day appointed, (*x*) nor as it should seem *before* the day as that would have a tendency to benefit the tenant for life, at the expense of the remainderman (*y*).

It is perfectly clear that several demises may be comprised in one deed, although very subtle distinctions are taken between what are, and what are not distinct reservations so as to constitute several leases. It frequently happens that lands comprised in a power, are demised in the same lease with lands not comprised in the power, or lands are demised, as to some of which the power is duly complied with, and as to others, it is not; and in these cases, the validity of the lease depends upon the quantum of the rent reserved, and the mode of the reservation.

The first question arose in How and Whitfield (*z*); the ancient rent was required to be reserved, which amounted to 6s. per annum. and by the pleadings it appeared, that the lands within the power *inter alia*, were demised, reserving *proinde* 6s. per annum, and the court thought it might be intended that the *inter alia* might comprehend nothing, but such things out of which a rent could not be reserved, and then the 6s. were reserved only for the 5 acres (the land comprized in the power). However the *proinde* might reasonably be referred only to the 5 acres, and not to the *inter alia*, and that a distinct reservation of 6s. might be for 5 acres, and judgment was given accordingly. Thus the case is reported

(*x*) See Ludlow *v.* Beckwith, Al. 90.

(*y*) *Vide supra* p. 515.

(*z*) 1 Ventr. 339, 2 Jo. 110, 2 Show 67; and see Earl of Cardigan *v.* Montagu, App. No. 14.

in

in Ventris, but even on that statement the court does not appear to have decided, what it would have been difficult to do, that a lease of lands comprised in the power, with other lands, yielding *therefore* a single rent, sufficient only for the lands in the power, should be held to issue out of them only. The court appears merely to have taken advantage of the pleading, and to have *intended* that there was a *distinct* reservation of the 6s. for the lands comprised in the power, which certainly would have been valid; and moreover it appears from Jones's report of the case, and he was one of the judges before whom the cause was heard, that the court thought the objection good, but the defendant perceiving that the opinion of the court was against him on another, which was the grand point in the cause, consented upon payment of costs, that judgment should be given for the plaintiff. With this Shower's report agrees, and Jones is there made to say, that "proinde" was the most common and general word used in leases for *all* the things demised.

In a case like that of How and Whitfield, it would not be possible under any construction, to support the lease. If, for instance, the reversions of the several estates were afterwards to descend to different persons, there must be an apportionment of the rent, and then sufficient would not be left to satisfy the terms of the power. There is no sound principle upon which it can be contended, that the whole rent is reserved in respect only of the land within the power.

The great case of the Earl of Cardigan *v.* Montagu, (*a*) went a step further. It appeared that lands com-

(*a*) App. No. 14. (3) (5) and see (2).

prised

prised in the power, and lands excepted out of the power were demised by one lease at an *entire rent*, and the lease was deemed invalid, and not warranted by the power: and it does not appear to have been thought necessary to enquire whether upon an apportionment, the rent payable in respect of the lands comprised in the power, would be sufficient. It seems to have been thought that the difficulty under which the remainder-man would labour in this respect, was of itself a fatal objection to the lease.

The other point arose in the case of Orby *v.* Mohun (*b*), but it was unnecessary to decide it. Lands anciently and lands not anciently demised, were all demised by one lease, reserving therefore "*the ancient rents*," and supposing the reservation good, considered abstractedly, the question was whether the lease was not bad, on the ground that it comprized the lands *not* anciently demised. In support of the lease it was argued that the rent issuing out of all, must be apportioned, and so it would be in nature of several leases in construction of law, because *reddendo singula singulis*, the ancient rents shall be construed to be reserved for the lands anciently let, and no rent being reserved for the lands not anciently demised, 'tis void as to them. But Lord C. J. Trevor expressed a contrary opinion, and placed much weight on the word, "therefore," in the reservation. He, however, declined delivering an absolute opinion on the point, as he went upon another reason (*c*). Lord Keeper Cowper also thought the lease bad, on the ground of the reserva-

(*b*) 3 Cha. Rep. 56, *supra* p. 517. (*c*) 3 Cha. Rep. 58, 59.

tion (*d*). But Lord Chief Justice Holt maintained strongly the contrary opinion; he insisted that the reservation was several, for that which was *not* anciently demised, will not hurt the other, but must fall to the ground, and the contrary opinion, he said was contrary to all the rules of law, and as to the word *therefore*, he clearly proved that however joint words are, yet they shall be taken severally, where they have a distinct subject matter to work upon (*e*).

Lord Chief Justice Holt's opinion, appears to be supported by the case of Campbell *v.* Leach (*c*), there opened and unopened mines were demised by one deed, reserving generally a certain proportion of the produce. The master of the Rolls held that the power did not authorise a demise of the unopened mines, and the lease being of opened and unopened mines, the whole was void. Upon the appeal it was argued not to be like the case, where two things are granted which are inseparable, and the one is out of the power, and the other within it, in such case the lease might be void as to both. But here the opened and unopened mines, were separate, and the rent reserved was not a gross sum for the whole, but a proportion of the profits of each mine. And the court accordingly over-ruled the objection.

The cases seem to establish this principle: where as in How *v.* Whitfield, and the Earl of Cardigan *v.* Montagu, an entire gross sum is reserved generally and

(*d*) 3 Cha. Rep. 78, 79.

(*e*) 3 Cha. Rep. 68, 69.

(*c*) Ambl. 740, *vide supra.*

part

part of the lands are not comprised in the power, or being comprised in the power, are not duly demised, the power is badly executed, although the rent upon an apportionment would be sufficient for both estates. But where as in Campbell *v.* Leach, a rent is reserved according to the quantity, or produce, as the tenth of the produce of every mine, or 40*s.* an acre, or the like, there although the demise is joint in terms and part is not well demised, or not comprised in the power, yet it shall hold good as to the lands comprised in the power, and duly demised. It might perhaps, have originally been contended that if a gross rent were reserved for both estates, and upon an apportionment, the proper rent would still be payable for the lands within the power, and duly demised in other respects, the lease would be good. But according to the authorities, it seems to be sufficient to impeach the lease, that it contains lands not comprised in the power, and that an entire rent is reserved in respect of both the estates, although perhaps, this cannot be treated as a general rule, admitting of no exceptions. Suppose an estate to be held in undivided moieties, and the same person to be seised in fee of one moiety, and tenant for life, with a power of leasing, of the other, and suppose him to make a lease of the entirety at an entire gross rent, there seems reason to contend that upon his death the rent would go according to his several interests in the land, that is one moiety with the settled portion of the estate, and the other moiety with the unsettled, and that if the rent were sufficient in amount, the power would be well executed.

In none of the cases hitherto considered, was there

a distinct reservation of a particular sum in respect of the lands comprised in the power; where there is such a reservation, that constitutes a several demise, and no objection can be raised to the execution of the power (*a*).

In powers of leasing, it is usual to express that the rent reserved shall be incident to and go along with the reversion and inheritance of the estate demised, and in well drawn leases under powers, the rent is accordingly reserved to the tenant for life, and after his decease to the person or persons who shall, for the time being, be entitled to the reversion and inheritance of the premises under the instrument creating the power. But it is well established, that a reservation to the tenant for life, exercising the power, "his heirs and assigns," is a good reservation, for those words mean of necessity, the person to whom the inheritance shall go; the words can have no other meaning (*b*). It is not unusual to reserve rent generally during the term without saying to whom; and in Whitlock's case it was agreed, that this was the most clear and sure way, and the law will make the distribution. However, all the three several ways, viz. to the tenant for life and persons in remainder; to the tenant for life, his heirs and assigns, and generally during the term, are good enough and effectual in law.

(*a*) For what amounts to a several reservation, see Knight's case, 5 Rep. 54, b.

(*b*) Whitlock's case, 8 Rep. 69, b; Hotley *v.* Scot, Lofft. 316; and see Dougl. 572; Campbell *v.* Leach, Ambl. 740.

Before

Before closing this section, we may recall to our remembrance the case of Talbot *v.* Tipper, where, as we have seen, under a power "to lease with or without fine, and rendering such rents and services as the donee should think fit," it was determined that no rent whatever need be reserved (*e*).

(*e*) *Vide supra*, p. 374.

SECT.

SECTION V.

OF THE COVENANTS AND CONDITIONS TO BE OBSERVED.

In the usual power of leasing, besides the reservation of the best rent, it is usually required that the lessee covenant for payment of the rent, that a clause be inserted for re-entry in default of payment, that the lessee be not made dispunishable of waste, and that he execute a counterpart of the lease, and if any of these conditions be not complied with, the lease will be void.

It should never be stated *generally* that a clause of re-entry shall be contained in the lease, but it should be expressly stated how many days the rent must be in arrear, the usual period is twenty-one days. It seems however that a reasonable time may be inserted, altho' the power is general on this head. In the case of Jones *v.* Verney (*a*) this was done, and no objection appears to have been made on that ground, although the case was much considered. Indeed, if such an objection were to prevail, it would invalidate nine-tenths of all the leases in the kingdom granted under powers.

In the case of Hotley *v.* Scot (*b*), the power required the insertion in the leases of a clause of re-entry on non-payment of the rent for twenty-one days. A lease was made with a power of re-entry in case the rent should be behind for twenty-one days, *having been lawfully demanded or no sufficient distress.* In support of the

(*a*) Willes, 169. (*b*) Lofft 316.

lease

lease, it was argued, that nothing was added but what came in by force of law, or followed upon a deficiency of the vague and not sufficiently explicit words of the power. Is not rent, it was asked, always to be demanded before a distress becomes liable or a forfeiture incurred? And as to the other, if there be a sufficient distress, what then? The rent will be recovered without re-entry; and, neither in reason, equity, or conscience, could there be any other intent of the original power. And Lord Mansfield said, that as to demand, a clause of re-entry was required as a security for the rent: demand is requisite both by common law and statute: a clause of re-entry will never be allowed to operate farther than as a security for rent.

Lord Mansfield, however, does not appear to have adverted to the condition as to the want of a sufficient distress, which was perhaps the most difficult part of the case: if the remainder-man should re-enter for non-payment of rent, he might be turned round, unless he had searched every corner for a sufficient distress (*d*). Such a condition therefore is a serious restraint on him, not authorised by the power, and it may be thought to be still doubtful whether such a lease could be supported.

If, contrary to the clause, that the lessee be not made dispunishable of waste, he be impowered to work unopened mines (*e*), fell trees, or do any other act which amounts to waste, the lease will be void, unless indeed in the case of a building lease, where it should seem the clause would be deemed repugnant to the power

(*d*) See Rees *v.* King, For. Excheq. Rep. 19.
(*e*) Campbell *v.* Leach, Ambl. 740.

itself

itself, and the lessee might pull down old buildings, &c. in order to erect new ones (*f*).

Where a counterpart is required to be executed, the lessee should obtain a memorandum of its execution and delivery to the lessor, to be indorsed on the *lease* and signed by the lessor, for the counterpart itself is of course delivered to the lessor, and, if it should be lost or suppressed, the lessee would be in danger of losing the estate unless he could prove the execution of it. Besides, without this precaution, a purchaser from the lessee cannot be satisfied that the power was duly executed, as the lessor may refuse to discover whether a counterpart was executed.

In the case of Taylor *v.* Horde (*g*), where the power required the best rent to be reserved, payable during the term, *but was silent* as to any covenant for payment of rent, clause of re-entry, or counterpart; and a lease was executed, in which none of these things were observed; Lord Mansfield considered the lease void, because it was merely nominal, and not executed by the lessees; but he proceeded to consider the effect of the omission. He said, that (*h*) as to the rent reserved, the power requires "the best rent that can be reasonably got, to be reserved payable during the the term." There is no covenant for payment. Under a mere reservation, it could not be payable till entry; and therefore, in fact, might never be payable during the term. As to the remedy, there being no covenant to pay the rent, the lease might be assigned to a succession of beggars. There being no clause of re-entry, the ground might lie unoc-

(*f*) See Jones *v.* Verney, Wilks 169.

(*g*) 1 Burr. 60.

(*h*) 1 Burr. 125.

cupied without any or not sufficient distress upon it: so that the remainder-man could neither have his rent nor his land. There is no counterpart, an unusual omission, and very prejudicial. *Therefore the lease could not have been supported if it had been executed by the lessees,* which is not the case. Every fraudulent unfair execution of such a power, in respect of those in remainder, is void at law.

It should seem, therefore, that the circumstances usually made requisite in powers of leasing, must be considered as implied, although not expressly required.

Where the power does not require any particular covenants to be contained in the lease, it is no objection to a lease under the power, that it do not contain the same covenants as were inserted in the former leases, if they are upon the whole equally beneficial as the former. To impeach the lease, the ground must be, that the new covenants are *a fraud on the power,* by lessening the value of the reservation (*k*).

Sometimes a power expressly requires the leases to contain usual, or usual and reasonable covenants, or the like, and in these cases, unless the covenants contained in the former leases are inserted in the new leases, they cannot be sustained; as where covenants, to repair, to grind corn at the lessor's mill, not to cut or fell coppices and underwoods, not to put any cattle into the coppices, and the like were contained in the old leases, but not in the new ones granted under a power requiring (as it was held) the accustomed covenants to be

(*k*) Goodtitle *v.* Funucan, Dougl. 565; see Earl of Cardigan *v.* Montagu, App. No. 14.

entered

entered into, the new leases were deemed invalid, on the ground, that these covenants did in their nature, tend to the preservation, management and improvement of the premises demised, and were for that reason, for the benefit, advantage and security not only of the immediate lessor, but likewise of all persons claiming after him (*l*).

In Jones *v.* Verney (*m*), a power to grant building leases required the leases to contain "the usual and reasonable covenants." A lease was made and the lessee covenanted to keep the old messuage, and buildings on the land in repair, and to *repair such other messuage or buildings, as should during the term be built on the premises.* The court upon the whole, thought that this was not a *building* lease, under the power, and Lord Chief Justice Willes, said, that "*a reasonable* covenant in a building lease, must certainly be meant of a covenant to build: but there was none such in this lease."

In the case of Doe *v.* Sandham (*n*), usual and reasonable covenants were also required, and in the lease the lessor covenanted that in case of fire, &c. he or the person for the time being entitled to the freehold, should rebuild, or in default thereof, the tenant might quit the premises and be discharged from payment of the rent. The jury found the covenant to be *an unusual and unheard of covenant* on the part of the lessor, and the lease was accordingly determined to be void both at law and in equity.

(*l*) Earl of Cardigan *v.* Montagu, App. No. 14. (4) (7) (8).

(*m*) Willes 169.

(*n*) 1 Term Rep. 705, *supra* 296.

The

The construction is the same upon any word tantamount to the word "covenants" as "boons," or the like. This was decided in the case of the Earl of Cardigan v. Montagu (*a*). The words in the power were, "reserving ancient, usual and accustomed rents, *boons*, heriots and services." And it was determined that the covenants formerly entered into were boons, and that therefore leases granted under the power, in which the usual covenants were omitted, could not be supported. The principle Lord Chancellor Hardwicke rested upon was, that the estate must come to the remainder-man, in as beneficial a manner, as ancient owners held it.

The *omission* of a proper covenant avoids, we have seen, the whole lease. In Doe and Sandham (*b*), it was argued that the *introduction* of an improper covenant, although it imported to bind the freehold, was merely void, and ought not to affect the validity of the lease, but Mr. Justice Buller observed, that this argument, if it proved any thing, proved this, that no lease executed under a power, could be bad except from the *omission* of some covenant required; because each covenant which is contrary to that power, might be rejected, but that would be contrary to all the adjudged cases on the subject. The lease must be taken good or bad on the face of it. Now where the lease on the face of it imports to bind the reversion as well as the tenant for life, inasmuch as the tenant for life has exceeded his power, the lease cannot bind the reversion, and is, therefore void.

If a proper covenant be omitted the lease cannot be supported, because the lessee has of his own accord done

(*a*) App. No. 14. (*b*) *Vide Supra.*

that

that which he ought to have covenanted to do: *quod initio non valet, tractu temporis non convalescet,* therefore, if a covenant to build, be wrongfully omitted, it is no argument in favour of the lease, that the lessee has actually covered the estate with buildings (*c*).

It remains only to observe, that where usual covenants are required, they must be expressly inserted: a lease with a clause in the very words of the deed would not be good, nor could it be aided by any special verdict, finding what the usual covenants are (*d*).

(*c*) Jones *v.* Verney, Willes 169; and see Cooper v. Denne, 4 Bro. C. C. 80.

(*d*) See 3 Cha. Rep. 76.

APPENDIX.

No. I.

Case in the reign of HENRY VIIth (*a*).

THIS case first came on in the 14th Henry VII. and is the last case reported in that year. In the King's-bench the case was such: A man had certain feoffees in his land to his use, and made his will, and wills that his lands shall be sold after the death of one A, whom he willed to have the profit during his life; which feoffees have enfeoffed others to the use to perform the will of the testator; and if the second feoffees shall sell the land or not, that was the matter, Kings. *semble*, that the second feoffees may well sell the land.

This case came on again in Trinity term, in the 15th of Henry VII. and is in the year-book, fo. 11 b. A man enfeoffs A and B upon trust, and afterwards he makes his will, and recites that A and B were seised to his use, and that his will is, that the said A and B should make an estate to his wife for the term of her life, and the remainder to his son and heir, and to the heirs of his body begotten. And if the son should die without heirs of his body, then his will was, that the aforesaid feoffees should alien the said land; and that the money arising thereby should be distributed for his soul. Then the feoffor died, and the feoffees make a feoffment over to the same use, and declare their will

(*a*) *Vide supra*, p. 53.

that

that the second feoffees shall act according to the first will, &c. And the wife dies, and the son of the first feoffor dies without heir, and the second feoffees alien the land to a stranger in fee, and if this alienation was good or not, that is the matter. Per *Rede*, justice. It seems to me that the second feoffees cannot make an alienation according to the will of the first feoffor; for the will of the man ought to be taken according to the intent of him who made the will, and according to the law of the land; for if a man makes his will, that the land of which he was seised shall be sold and aliened to I. S. after his death, &c. and then dies seised, there his will shall not be performed, because his will is contrary to the law of the land, to make a will of land of which he was seised, and died seised: *quod fuit concessum per Tremaile.* And so if a man has feoffees upon confidence in his land, and makes his will, that one I. S. shall alien his land, and there is no such person in *rerum natura*, there his will is void, because no other man can sell that; and, for that reason, the feoffees shall be seised to the use of the heir, &c. because it appears by the will, that no other man shall interfere with the alienation. And so also if a man has feoffees in his land, and makes his will that I. N. shall alien the land; there, if I. N. dies without heir, his executors shall not alien, because that is not warranted by the will; but the feoffees shall remain seised to the use of the heir of the first feoffor. And so it is where he names the feoffees from the first in the will, and then he says, the aforesaid, &c. feoffees shall alien the land for his soul: the authority is solely given to them, and their executors cannot alien this. But if these feoffees make a feoffment over to the same use, yet the first feoffees may alien the land according to the will of the first feoffor: *quod fuit concessum per Fineux et Tremaile.* And also the second feoffees may alien the land by the commandment of the first feoffees, and that is good, for it is the sale, and the alienation of the first feoffees in law. And no one will deny, that the second feoffees cannot alien the land during the life of the first feoffees, if it be not by their commandment; so that it be, in fact, their alienation; and by consequence no more can they sell after the decease of the first feoffees. *Tremaile* to the same purpose.

pose. And there is a diversity where the will is, that the alienation shall be made to a person certain; and where it is, that the alienation shall be made generally: for if the will was, that the aforesaid feoffees alien to one I. S.; there, if they make a feoffment over to the same use, yet the second feoffees shall make this alienation, for there is in a manner an use to I. S. *quod fuit concessum, per Rede et Fineux.* But when the will is, that the aforesaid feoffees shall alien, there the authority is solely given to them: for if his will was, that his executors shall alien his lands, although they refuse to alien, yet the feoffees cannot alien. So if his will was, that the feoffees shall alien, and they will not, but die, yet the executors cannot alien. And so it is here. *Fineux* chief justice, to the same purpose. And so if a man makes not a will, the common law makes a will for every man, as to his lands and his goods, and that is, so that the heir shall have the land, and the ordinary the goods. But if a man is desirous that his land shall be aliened in another manner to that which the common law ordains, then the common law suffers him to make his will of them. And every will which a man makes ought to be construed and taken according to the purport of the words; or, as it may be implied and understood by the words, what his intent was. Therefore here, when he recites the names of the feoffees, and then says that the aforesaid feoffees shall alien, &c. there it is as much as to say in effect that no other shall alien except them. And if the will was, that the aforesaid feoffees should alien within the two years next ensuing, if they do not do so, they cannot do it afterwards, but the heir of the feoffor shall have the land for ever. And if a man makes his will that I. S. shall have his land *in perpetuum* for his life, there by that he shall only have it during his life; for these words "during his life," abridge the interest given before. And so here, when he says the aforesaid feoffees shall alien, there no other can have that power, but only them. And there is a diversity where the power given to the feoffees is annexed to the land, and where not; for if the will be, that the aforesaid feoffees shall make an estate over to a certain person for certain years, there, if they make feoffment over to the same use, the first feoffors cannot do that, for

for that power is a thing annexed to the land, which no one can do but he who has the land. But here the will was, that the aforesaid feoffees shall alien the land, &c. and that may well be done after the feoffment made by themselves to the use; and therefore their power is not determined by their feoffment. And if a man has feoffees upon confidence in his land, and makes his will that his feoffees shall alien his land to pay his debts, there the creditors shall compel the feoffees to alien, &c. *quod fuit concessum per Rede et Tremaile.* And so if the will was, that a stranger shall alien this land to one I. S. there I. S. shall compel this stranger by *subpœna* to alien this land to him; and the feoffees cannot alien. But if the will was, that the feoffees shall alien his lands for money to distribute, &c. *(in pios usus)*, there no man can compel them to make an alienation, &c.; for no one is damaged, although the land be not aliened, &c.; and so there is a diversity, *quod fuit concessum.* And if a man has feoffees upon confidence, and makes a will that his executors shall alien his lands, there if the executors renounce administration of the goods, yet they may alien the land, for the will of land is not a testamentary matter, nor have the executors to interfere in this will, except so far as a special power is given to them. And if a man has feoffees in his land, and makes his will that his executors shall sell his land, and then he does not make executors, there the ordinary shall not meddle with the land nor the administrator neither, for the ordinary has only to meddle with testamentary matters, as of goods; and consequently no more can the administrator, who is but his deputy. And, therefore, it was lately adjudged in the Exchequer chamber by all the judges of England, that if a man makes a will of his lands, that his executors shall sell the land, and alien, &c. if the executors renounce administration and to be executors, there neither the administrators nor the ordinary can sell or alien, &c.; *quod nota. Quod fuit concessum per Rede et Tremaile*, for good law. And if a man makes his will that his executors shall alien his land, without naming their proper names, if they refuse the administration and to be executors, yet they may alien the land: *quod fuit concessum per Fineux et Tremaile* for clear law: *Rede non dedixit.*

And

And if a man makes his will, that his land which his feoffees have, shall be sold and aliened, and does not say by whom, there his executors shall alien that, and not the feoffees, *per Rede, Tremaile, et Frowik. Fineux* said nothing to this this day; but the day before, he in a manner affirmed this. *Conisby* said that the feoffees shall alien this, for they have the confidence placed in them, &c. But this was denied, for executors have much greater confidence placed in them than the feoffees have, for the money to arise by the sale of the executors, shall be assets in their hands, and therefore they shall sell. *Fineux, Rede et Tremaile* said, that if a man makes his will that his feoffees shall alien his land, before the alienation the heir may take the profits, and they are seised to his use; and if an alienation be not made by them, the heir shall have the land for ever, &c.

No. II.

Appointment and Release to uses to bar dower (b).

THIS INDENTURE of four parts made the 10th day of February in the 48th year, &c. and in the year of Lord 1808. Between John Smith of &c. of the first part, Thomas Brown of &c. of the second part, William Taylor of &c. of the third part, and Samuel Williams of &c. of the fourth part. WHEREAS, by indentures of lease and release, bearing date respectively the first and second days of September 1804; the release being made or expressed to be made, between Richard Sims, gentleman, and Mary his wife, of the first part, the said John Smith of the second part, and the said Thomas Brown, of the third part, and by a fine sur conuzance de droit come ceo, &c. duly acknowledged and levied, by the said Richard Sims, and Mary his wife, in or as of Michaelmas term, in the 44th year of the reign of his present Majesty in pursuance of a covenant, for that purpose entered into, by the said Richard Sims, in and by the said inden-

(b) *Vide supra*, p. 156.

ture

ture of release, and by force of a declaration of the uses of the said fine in the same indenture, contained; in consideration of the sum of 1000*l.* to the said Richard Sims, paid by the said John Smith, the messuages, lands, and other hereditaments, hereinafter particularly mentioned, and intended to be hereby appointed and released with their appurtenances, were conveyed, limited and assured, To such uses upon such trusts, for such intents and purposes, and with under, and subject to such powers, provisoes, agreements, and declarations, as the said John Smith should, by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered, in the presence of, and to be attested by two or more credible witnesses, from time to time, direct limit or appoint. And for default of, and until such direction, limitation or appointment, To the use of the said John Smith and his assigns during his life, with a limitation to the use of the said Thomas Brown, and his heirs during the life of the said John Smith, in trust for him, the said John Smith and his assigns during his life, with remainder to the use of the said John Smith, his heirs and assigns for ever. AND WHEREAS the said John Smith hath contracted and agreed with, and to the said William Taylor, for the absolute sale, to him the said William Taylor, of the messuages lands and other hereditaments hereinafter particularly mentioned and intended to be hereby appointed and released, with their appurtenances, and the fee simple, and inheritance thereof, in possession, free from all incumbrances, at or for the price or sum of 1000*l.* AND WHEREAS the said William Taylor is desirous that the said messuages, lands, and other hereditaments, should be conveyed and limited to the uses hereinafter expressed, or declared of, or concerning the same. NOW THIS INDENTURE WITNESSETH, that in pursuance, and part performance of the said agreement, on the part of the said John Smith, and for and in consideration of the sum of 1000*l.* of lawful money of Great Britain, to the said John Smith, in hand, well and truly paid, by the said William Taylor, at or immediately before the sealing, and delivery of these presents, (the receipt of which said sum of 1000*l.* the said John Smith doth hereby admit and

and acknowledge, and of, and from the same, and every part thereof doth acquit, release and discharge the said William Taylor, his heirs, appointees, executors, administrators and assigns for ever by these presents), and pursuant to, and by force and virtue, and in exercise and execution of the power or authority to him for this purpose, given or limited by the hereinbefore in part recited indenture of release, and the fine levied in pursuance thereof, and of every, or any other power or authority, in any wise enabling him in this behalf; He the said John Smith doth by this present deed or writing, by him sealed and delivered, in the presence of the two credible persons, whose names are intended to be hereupon indorsed as witnesses, attesting the sealing and delivery of these presents by him the said John Smith, Direct, limit and appoint, That the messuages, lands, and other hereditaments, hereinafter particularly mentioned, and intended to be hereby granted and released with their appurtenances, Shall henceforth go, remain and be, To the uses upon and for the trusts, intents and purposes, and with under and subject to the powers, provisoes, agreements and declarations, hereinafter expressed or declared, of or concerning the same. AND THIS INDENTURE ALSO WITNESSETH that in pursuance and further performance of the said agreement, on the part of the said John Smith, and in consideration of the sum of 1000*l.* so paid, by the said William Taylor as hereinbefore is mentioned; and for, and in consideration of the sum of 10*s.* of like lawful money, to the said Thomas Brown, paid by the said William Taylor, at or immediately before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged); He the said Thomas Brown at the request, and by the direction of the said John Smith, (testified by his being a party to, and sealing and delivering these presents); Hath bargained sold and released, And by these presents, doth bargain, sell and release; And he, the said John Smith, Hath granted, bargained, sold, aliened, released and confirmed, And by these presents, doth grant, bargain, sell, alien, release and confirm, unto the said William Taylor (in his actual possession now being, by virtue of a bargain and sale to him thereof made by the said John Smith and Thomas

mas Brown, in consideration of 5*s*. each, by an indenture bearing date the day next before the day of the date of these presents, for the term of one whole year commencing from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses to possessions), and his heirs, All, &c. [Parcels and general words.] And the reversion and reversions, remainder and remainders, yearly, and other rents, issues, and profits of all and singular the messuages, lands and other hereditaments herein-before granted and released, or expressed, and intended so to be. And all the estate, right, title, interest, inheritance, use, trust, possession, property, possibility, claim, and demand whatsoever, both at law and in equity of them the said John Smith and Thomas Brown, and each of them, of, in, to, from, and out of the same premises, and every part and parcel thereof: To have and to hold the said messuages, lands, hereditaments, and all and singular other the premises hereinbefore granted and released, or expressed, and intended so to be, with their appurtenances, unto the said William Taylor and his heirs, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed or declared, of, or concerning the same [Covenant from Thomas Brown that he has done no act to incumber]. And it is hereby agreed and declared between, and by the parties to these presents, that the direction, limitation, and appointment, grant, releases, and confirmation hereinbefore contained, and hereby respectively made as aforesaid, shall operate and enure to such uses, upon such trusts, to and for such intents and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations as the said William Taylor shall, by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in the presence of, and to be attested by two or more credible witnesses from time to time direct, limit or appoint; and for default of, and until such direction, limitation, or appointment, and so far as every or any such direction, limitation, or appointment shall not extend; to the use of said William Taylor and his assigns during his life, without impeachment of waste; and after the

the determination of that estate by forfeiture or otherwise in his lifetime; to the use of the said Samuel Williams and his heirs during the life of the said William Taylor, in trust for him the said William Taylor and his assigns during his life, and to the the end and intent that neither the present nor any future wife of the said William Taylor may become entitled to dower out of, or in the said premises, or any part thereof; and immediately after the determination of the estate hereinbefore limited to the said Samuel Williams and his heirs during the life of the said William Taylor; to the use of him the said William Taylor, his heirs and assigns for ever. [Usual covenants for title]. In witness, &c.

No. III.

Hele v. *Bond*. (c)

14th and 16th March, 1684.—BY lease and release, and by fine, Sampson Hele made a voluntary settlement. In the release was contained the following proviso: "That if the said Sampson Hele shall at any time or times hereafter during his life be minded to alter and make void the uses limited to the sons of Sampson Hele the younger, and their issue male, and to his own issue male, and shall at any time, or from time to time during his life, by any instrument or writing by him to be sealed, and with his own hand subscribed in the presence of two or more credible witnesses, who shall write their names as witnesses thereto, signify and declare the same, and thereby, or by any other writing or writings to be by him sealed, and subscribed, and witnessed as aforesaid, shall limit, declare, or appoint the use of the premises to any other persons in any other manner than is before limited, and for any estate or estates in fee simple, fee tail, for life, or any number of years in possession, &c: And any such new limitation or appointment by any other writing in like manner to be sealed and subscribed and witnessed from time to time, shall and may revoke and alter, and also make any other limitation of the premises by any other writing in like manner to be sealed and subscribed to

(c) *Vide supra*, p. 245.

any

any other persons, or in any other manner, or for any other estates in possession, &c. and so from time to time, and so often as the said Sampson Hele, the elder, shall think fit." Then the fine should enure to the new uses.

5th Oct. 1687 —Sampson Hele, senior, by deed poll, setting forth *in hæc verba*, his said powers to revoke and limit new uses, and such new uses to revoke again, and limit other, and referring to such powers, did, according to the said powers, revoke the estates authorised to be revoked, and *pursuant to the same powers* limited new uses. There was no power of revocation in this deed.

11*th Oct.* 1704.—Sampson Hele, senior, setting forth in like manner his powers in the first settlement, revoked the uses of the settlement, and also those of the deed poll, and by virtue of his power *in the settlement*, and of all other powers limited new uses.

3*d Feb.* 1712.—The cause to try the validity of the last revocation came to be heard before Lord Chancellor Harcourt, when several authorities being cited, his Lordship took time to consider thereof; and a few days afterwards he declared it was a new case, and that he did not find any authority to warrant such a revocation, nor was there any instance in any of the authorities insisted on of such power of revocation, but he referred it to the Judges of B. R. for their opinion:

> Whether the uses limited by the deed poll of 5th October 1687 were well revoked by the deed of 11th October 1704, by virtue of the power of revocation contained in the deed of 16th March 1684, or by the recital of that power in the deed poll of 1687?

10*th July* 1713.—Lord C. J. Parker, Powys and Eyre Justices, certified that they, with the late Mr. J. Powell, heard counsel upon the question, and were all four of opinion that the power of revocation and limitation of new uses in the deed of March 1684 was fully executed by the deed poll of 1687, and that the further power in the deed of March 1684 to revoke any new limitation or appointment was void in the creation as to such uses as should afterwards be newly limited, unless a power of revocation should be again expressly reserved, which they thought was not

not done by the recital of the powers in the deed poll of 1687, and consequently that the uses limited in the deed poll were not revoked by the deed of 1704, and that all four were ready to have given their opinion accordingly; but some of the counsel for the defendant desiring to be further heard, they three (since the death of Justice Powell) had heard counsel again, but saw no reason to alter their opinions.

18th July 1713.—Lord Harcourt concurred in the opinion of the judges, and decreed accordingly.

1717.—From this decree there was an appeal. The reasons for the appellant were signed by Northey, Raymond, and Jodrell; and they insisted, 1. That the original power reserved to revoke all new uses, was valid, for the intent of the party ought to be the guide in these cases, and this intent was as fully expressed by the proviso precedent to the uses in the deed of 1687, as it could ever be by any proviso subsequent, which had there been, it was admitted the uses created by the deed of 1704 would have been good. And 2. That the original powers were only partially executed by the deed poll of 1687, and the further power to revoke such new uses was still subsisting, and such an original existing power had never been determined before this to be void. On the other hand, the only legal reason insisted upon by Powys and Cowper, who signed the reasons for the respondent, was, that if such ambulatory and endless powers of revocation (powers within powers, and without precedent in the law) were allowed, purchasers and marriage settlements with ease might be defeated, and titles be rendered precarious and uncertain.

This case was ably argued in the house of Lords by Sir Thomas Powys and Sir Peter King for the respondents, and by Sir Edward Northey for the appellant.

Both sides insisted upon the resolutions in Digges's case, 1 Co. 173, as authorities in their favour.

For the respondent, it was argued, that the power could be exercised but once; and they likened powers of this nature to conditions at common law, and that at common law such a continuing condition as this could not have been created. They enlarged upon the endless contests which a contrary doctrine would

introduce, and the dangers and frauds to which it would subject purchasers, whilst on the other hand it was easy to add a power of revocation where such was the intention. And they moreover insisted, that as a power of revocation may be reserved *toties quoties*, this power was only tantamount to the usual power of revocation: and being once fully executed without a new power reserved, was *functus officii*.

On behalf of the appellant, it was argued, that as the other party admitted that a power of revocation *toties quoties* might be newly reserved, it was impossible to contend that this power which in its first creation enabled such revocation *toties quoties*, was invalid. In the cases which had occurred the power was single, and it was therefore absolutely necessary to reserve a new power; but in this case the first power prevented the necessity of any future power.

It was more consonant to the rule of law to limit all the uses in the first deed declaring the uses of the fine, 9 Co. 9; and this was no greater stretch than a power to appoint by will; in which case the *last* will, although there were twenty, would prevail, or a power to appoint by the *last* deed the donee should execute in his lifetime. It was in effect a declaration that the last uses he should declare only should stand.

In answer to the other objections it was said, that the power was only for the life of the owner, and so uses could not be limited *in infinitum*; nor was it dangerous to purchasers, as the future power would be fraudulent against them, and every purchaser would take a conveyance of the interest, as well as a limitation under the power, which would extinguish the future power.

But, even admitting the weight of this objection, it was forcibly argued, that the recital of the powers in the deed of 1687 was tantamount to a declaration of his intention that such powers should continue, and therefore amounted to a reservation.

The decree however was affirmed in the house of Lords. The journals of the house of Lords state, that after hearing the judges of the court of King's bench as to the matter of law, *who continued of the same opinion* as was certified by them to the court of Chancery,

Chancery, and also hearing *all* the other judges who concurred in opinion with the judges of the court of King's-bench, the appeal was dismissed and the decree affirmed (*a*).

No. IV.

Daniel v. *Goodwin* (*b*).

Exchequer, Trinity term, 8 and 9 Geo. II.

The husband, antecedent to the marriage, covenanted with his intended wife that she should have a power to dispose by will of her estate and effects. Subsequent to the marriage, the wife was made executrix to the last will and testament of A. The wife afterwards made her will of the goods and effects she had as executrix, and constituted B executor thereof. Upon a declaration in prohibition, and demurrer to the plea put in to it, the question was, whether the spiritual court had a power to grant a probate thereof, or whether it should not operate as an appointment to be carried into execution by a court of equity; and as to this point, the court took this difference: where the will subsisted upon the agreement of the parties antecedent to the marriage, there the will is in the nature of an appointment, which is to be carried into execution by a court of equity; but where the wife is made executrix to another person, there the spiritual court may grant a probate of her will, for she may continue the executorship by constituting a person executor to the first testator, and she may by law make a disposition of choses in action, which she was possessed of as executrix, because in auter droit, and the spiritual court may prove such will (*c*).

(*a*) Journ. Dom. Proc. 9 May 1717.

(*b*) *Vide supra*, p. 258.

(*c*) 1 Mod. 201; Salk. 308; Vent. 4; 6 Mod. 241; 1 Roll. Abr. 608; Moor 339; 2 Mod. 170.

No. V.

Mansell v. Price (e).

At the Rolls, Michaelmas Term, 9 Geo. II.

CATHERINE MANSELL, before her marriage with the defendant Price, assigned all her personal estate due to her by bond, judgment, &c. except 1000*l.* which the defendant was to have immediately to his own use, in trust for the defendant Price, and and Catherine his intended wife for their lives, and the life of the survivor of them, and afterwards that the principal money should be laid out in land to the use of the heirs of the body of Catherine by the defendant; and for want of such issue to the use of the survivor for ever, provided that Catherine should have power at any time during the coverture by will or deed executed in the presence of three or more credible witnesses, to give or dispose of any sum out of the principal money not exceeding 1500*l.* to such persons and uses as she should limit and appoint, which should be payable immediately after her decease in case she died without issue by the defendant Price. Catherine Price some time during the marriage duly executed the power by deed poll in the presence of three witnesses, and thereby, for the natural affection she bore to her niece Catherine Dawkins, and her eldest daughter Catherine, and for the next daughter, her said niece should have, did give, grant, and dispose of the said sum of 1500*l.* to Sir Edward Mansell, his executors and administrators immediately after her decease, if she died without issue, in trust, that he should pay to Catherine the eldest daughter of her niece 1000*l.* when she should attain the age of twenty-one, or marry, in case the marriage should be by consent of her mother; but if she should die before twenty-one, or married without consent, that then it should be to such uses as Catherine the niece, whether sole or covert by deed or writing, should direct and appoint, except to her husband, if she should have any, with or without power of revocation, and the other 500*l.* she directed to be paid to the next daughter of her

(e) *Vide supra*, p. 260.

niece

niece when she should be twenty-one, or marry, exactly under the same terms as before. Catherine, the niece, had afterwards issue, another daughter, and then Catherine Price died without issue. This bill was filed by the guardian of the infant daughters to have the money paid, and to be put out for them to have the interest thereof immediately. For the defendant Price it was insisted, that he was entitled to the interest of the 1500*l.* until the same should respectively become payable, either as a resulting trust (he being administrator to his wife), or part of his right under the articles taken from him by the execution of the power.

The first question was, whether parol evidence could be admitted to explain the intention of Catherine Price, what should become of the interest till the times of payment; for if that could be admitted, there was sufficient to prove the husband should not have it, but that it should go to the same persons to whom the money was given by the deed of appointment, and the Master of the Rolls was of opinion such parol evidence could not be read.

The second question was, whether there could be a resulting trust to the husband of the interest of the 1500*l.* till such time as it should become respectively payable according to the limitations in the deed.

As to this, he said this was not the case of a resulting trust, or a trust originally created, but it arose on a power given and executed out of an original trust, by which it must be considered as if it had never been comprised in that trust, because it was absolutely taken out of it by the execution of the power. This case of money differed from land where there was not a compleat disposition, for here was an entire and full disposition of the whole money, and it differed also in this respect, for land by law was always presumed to make a profit, and the form of all writs in real actions supposes it; but in the case of money it's otherwise, for its not supposed to have any profit at all, and the time was when it was thought illegal to make a profit of money, and the canon law would not suffer a usurer to make a will. Then here is a disposition of this money to Sir Edward Mansell, a trustee, by virtue of the power who is not bound to put out this money, though he may be compelled according to the judgment and di-

rection of this court, but of his own head he has no authority to put it out; and further, if a trustee not having power did put out money, it was at his own risk, and in that case since he had practiced, it had been thought that such trustee putting out money without the direction of the trust, or of the court, should have the profit for the risk of putting it out; but now if a trustee puts out money when not warranted by the trust, he must answer for ill security, and yet shall not have the benefit, because of late it had been easy and safe to lay out such money in government securities which this court thinks proper securities, having an act of parliament on its side. Then the whole capital money being in the hands of the trustee entirely for the benefit of *cestui que* trust, would draw the interest with it, so he decreed there would be no resulting trust on this power of appointment.

No. VI.

Observations on Hills v. *Downton* (*a*).

"THE ground of my determination seems to have been misunderstood. I was of opinion in Chapman *v.* Gibson, that the heirs being persons for whom the testator was under no natural or moral obligation to provide, there was no occasion to enquire, whether the heirs were provided for or not. I did indeed say, in that case, they having parents alive whose circumstances did not appear, they could not be presumed to be wholly unprovided for. I found it so often laid down, that the court would supply the want of a surrender against an heir, if he was not wholly unprovided for, and so many *dicta*, that if he was in that situation the court would not compel him to surrender, that I thought it proper to enter rather largely into the consideration of the principles upon which the court acted, in supplying surrenders; and I collected the principle to be this, that the heir shall be compelled to make good the disposition of his ancestor, if made in discharge of a moral or natural obligation, as in favour of creditors, wife

(*a*) *Vide supra*, p. 281.

and

and children; but still they had not done it where the heir, being a son, could shew that if he was compelled to make that surrender, the consequence would be (he being a son wholly unprovided for), that he would be compelled to fulfil the intentions of his father in discharge of a moral or natural obligation in favour of a widow, or of his brothers and sisters, when it was manifest that he had neglected to discharge the natural obligation he was under of providing for him, his eldest son. I admit that it had been laid down that the court would not enter into the quantum of provision of which it is declared the father is the proper judge; and feeling all the difficulties arising from the exception so often made to the rule of an heir wholly unprovided for, I shall be very glad to find that for the future the court may be at liberty to get over this exception to the rule. But if the case of a son wholly unprovided for were to come before me, I should hesitate, notwithstanding the great authority of the Lord Chancellor, to make a decree against him, and was very glad to be relieved in the case of Chapman *v.* Gibson, from the necessity of deciding upon that point, it being perfectly clear that the principle could not apply to the case of a collateral heir for whom the testator was not under any obligation to provide. "R. P. A."

No. VII.

Leach v. *Campbell.*

Reg. Lib. A. 1773, fol. 698 *(a)*.

The power of leasing is stated correctly in Ambler.

The original bill stated, that Leach pretended, that by indenture dated 10th. March 1759, Pryce Campbell, in consideration of former covenants, and for other considerations did demise, and grant to Leach, all the mines, veins, pitts, groves, rakes, beds, and holes of lead, lead ore, and all other mines, which were, or should at any time during the demise be found out, in or

(a) Vide supra, p. 297.

under the lands, with full licence, to open pitts, &c. and work the mines, and to make drains, &c. with right of way, to carry away the ore, and liberty to build forges, &c. To hold from 25th March 1759, for 26 years, paying unto Pryce Campbell, his heirs and assigns during the continuance of the demise, the 8th tondish of all the lead, &c. which should be got, the lessee to cleanse and deliver the same on the banks, every three months, or oftener if required. That the defendant insisted the lease was good under the power. But the plaintiff submitted that the lease was absolutely void, not being authorized by the power, for that such power was intended to extend to messuages or lands only, and not to mines as appeared from the condition of the said power, that there should not be contained in any lease, any clause, whereby any power should be given to any lessee to commit waste, which condition could not be complied with in a lease of mines, a restraint from commission of waste, being totally inconsistent and contradictory to a lease of mines, and the plaintiff also submitted, that if the power should be construed to extend to mines, yet the lease was not within the power, for the lease being made for twenty-six years, was made for a longer term than the power authorized, which was only twenty-one years. And that the lease being dated the 18th of March 1759, and it being expressed, Leach should enjoy the premises from the 25th of that month, the same was in reversion, whereas the power declared, that the leases should be in possession only. And that the reserved rent was not thereby made incident to the reversion of the premises, as was required by the terms of the power, but was made payable to Campbell, his heirs and assigns. And also that such rent was not a yearly rent, nor was it the most improved rent which at the time of the lease could be got for the mines. The rent ought to have been a 4th instead of the 8th, in corroboration of which the produce of the mines was stated, and it was insisted that Leach deceived Campbell, the lessor who relied on his information.

The answer admitted the lease to be in effect as stated. Leach stated that he had opened no new mines since the death of Campbell, or the making of the lease, he insisted upon his right

to

to the open mines at the time of the lease, which had been worked by him from 1743, under a lease, for twenty one years at a great expence. And he submitted that the parties intended the power to extend to mines as the mines, were at the time of the marriage, and many years before, in his possession.

He stated, that he being in possession of a lease for twenty-one years, commencing on the 8th June 1753, ending in June 1764, P. Campbell agreed to add twenty-one years to his term. By the lease for twenty-six years, the term of twenty-one years within a few months, was added to the then subsisting term.

He insisted that the rent was incident to the reversion, that the reservation quarterly, or oftener was more beneficial than being reserved yearly, and that the rent was the best that could be got. That after the lease of 1759, and with a view to his enjoying for twenty-six years, he laid out large sums in making levels, &c. from several of which he had yet received no advantage, although between the 25th of March 1759, and the 15th of June 1771, he had paid above 33,000l. in making and repairing the works.

He likewise stated that in 1763, he agreed to erect smelting works upon the waste lands of Pryce Campbell near the mines, and made proposals to Campbell, for taking a longer term in them than he had in the mines, or that a compensation should be made for them at the end of the lease of the mines. P. Campbell after considering the proposals, did by letters to the defendant in 1763 declare that he would by all means have the works go on, and that as he should not grant any lease of that for a longer term than the mines, it was but reasonable that a sum should be agreed upon, to be paid to the defendant, upon the expiration of the said term, the works being left in good repair, and the tools to be bought by appraisement, and that if the mill was left in perfect good repair, he, P. Campbell, should think what the defendant demanded, half of the sum laid out in building it, not at all unreasonable, and that the defendant would always find him very ready to do what he thought was so; and P. Campbell intimated his intention of becoming a partner which he afterwards declined. That in consequence of the lease

and

and letters of agreement the works were erected, but a regular agreement was omitted to be executed until 1768, when P. Campbell informed the defendant that he would have articles drawn relating to the works, but he died in that year without having executed any.

The answer insisted upon the lessee's right to the enjoyment of the term, at least during the residue of 21 years from the making of the lease.

The Master of the Rolls made the order stated in Ambler. Then a cross bill was filed by Leach for establishing the lease and agreement. The Master of the Rolls directed the account prayed by the original bill, and dismissed the last bill.

I met with an order for the hearing on the appeal, but could not discover the decree on the appeal or any subsequent proceedings, although I searched with attention to the end of the year 1777 for the original as well as the cross cause.

No. VIII.

Lane v. *Terry*.

Reg. Lib. B. 1753, fol. 527 (*a*).

It was charged by the bill, that it was previously to the marriage agreed that the wife should not have the benefit of the jointure, and that Terry, in trust for whom it was executed, threatened to throw Simon into prison if he refused to come into the measure; that Simon laboured under a mortal disease, of which he soon after died, and was greatly impaired in his senses as well as his health, and in that situation Terry prevailed on him to marry Ann, *with whom he never cohabited*; and the plaintiff submitted, that the intention of the power was to make an handsome provision for the donee's wife, and thereby enable him to marry one of circumstances suitable to his own, and not by colour of such jointure to pay his own debts, to which the pre-

(*a*) *Vide supra*, p. 329.

mises

mises were not liable, whereas the jointure set up was in fact a settlement on Terry.

It was decreed, "that the settlement by deeds of lease and release, and the paper writing entitled proposals upon executing the marriage deed, were to be considered as one entire agreement, and that the said agreement and settlement ought to be deemed in this court fraudulent and void, except as to the annual sum of 20*l.* provided for the benefit of Ann Lane during her life; and it was ordered and decreed that the same should be set aside, except as to the said annual sum of 20*l.*"

Note, the wife conveyed to Terry after the death of her husband upon the trusts, as stated in Ambler.

I have searched for the case in the King's bench, but did not meet with it.

No. IX.

Aleyn v. *Belchier* (*a*).

Reg. Lib. A. 1757, fol. 432 (B).

The estate in question was devised to trustees in fee, to raise money by mortgage, and then to uses, under which Edmund Aleyn was tenant for life, "with power to him to make a jointure of the manors lands and premises aforesaid, or any part thereof, upon any wife with whom he should after think fit to marry, for her life and in bar of her dower."

The trustees under a decree mortgaged to Belchier in fee.

Edmund Aleyn, shortly after his marriage, without any previous agreement, proposed to make a provision for his wife; and being then indebted to Belchier, by an agreement bearing date the 1st day of August 1750, and made between Aleyn and his wife of the one part, and Belchier of the other, reciting the matters aforesaid and that Aleyn was indebted to Belchier in a certain sum, it was witnessed, that in full satisfaction of that sum Aleyn covenanted to procure a conveyance and settlement to be

(*a*) *Vide supra*, p. 329.

made

made by the trustees of the estates, devised to them, to the uses, &c. in the will; and immediately after such settlement, to limit the same to his wife for her life, in case she should survive him for her jointure, and that he and his wife, as soon as they should become seised of the said estates for their lives, would by fine, &c. convey the same to the use of Belchier, or as he should appoint, for the lives of Aleyn and his wife, and the survivor of them: in consideration whereof, Belchier covenanted to pay the following annuities, &c. viz. to the wife, for the joint lives of her and her husband an annuity of 60*l.* for her separate use, an annuity of 60*l.* per annum to Aleyn if he should survive his wife, and 100*l.* a-year to the wife if she should survive him, and to the wife's son by a former husband 100 guineas at twenty-one, and 5*l.* a-year in the mean time for maintenance. A settlement was afterwards executed by the trustees, and Aleyn limited the estates to his wife for her life under the power, subject to the mortgage made by the trustees to Belchier, and afterwards Aleyn and his wife conveyed their life estates by a fine to a trustee for Belchier. Belchier insisted that the settlement was a good and effectual settlement, and was made upon a good and valuable consideration and was not void, and that he was entitled to the benefit of it.

The remainder-man stated, that he was advised, that in case the power of jointuring was executed by Edward Aleyn for any other purpose than for a fair jointure for his wife, such execution was contrary to the intention of the testator, and a fraud upon the remainder-man.

It was decreed, "that the deed of appointment was not to be supported in this court any further than to charge the premises with the annual sum of 100*l.* agreed to be paid by the deed of 1st August to Jane Aleyn the wife of Edmund," and directions were given accordingly.

No.

No. X.

Scroggs v. *Scroggs*.

Reg. Lib. B. 1754, fol. 496 (*a*).

The trust in the agreement before marriage was "to permit each son or sons of their bodies, and the heirs-male of such sons, to receive the rents during all such time as the trustees should have in the premises, as the plaintiff's father, together with the trustees or the major part of them, or together with the survivor of them should appoint." By the settlement the eldest son was in every event to have 100*l.* a-year, and *children* were substituted for *sons*. The settlement was executed when the plaintiff, the eldest son, was two and one-half years old, and he had lost his sight. The plaintiff stated that his father wanted him to sell his reversion, which he would not do, and that then the father made a bargain with the second son, to whom he appointed: That the father represented to the trustee that the eldest son had threatened to sell his reversion, and was very undutiful, &c. The plaintiff insisted that the variation in the settlement, as there was then no other son, and he had lost his sight, was to warrant an appointment to a daughter in case there was no other son.

The father and mother denied any knowledge of the variation, and stated the disorderly life of the son, and his marriage to a woman of no fortune. The father stated that he applied to his son to join in the sale of the estate for his own benefit.

The father's answer, in which he represented the Duke of Somerset, the surviving trustee, as a perfectly consenting party to the appointment, was flatly contradicted by the Duke himself, who stated, that he believed that the father had misrepresented the son to him, and that if he had been apprised of all the circumstances, he would not have executed the appointment.

There appeared to be a dispute between the father and eldest

(*a*) *Vide supra*, p. 330.

son

son about another estate, belonging to the son, of which the father had received the rents during the son's minority.

It was decreed, "that the deed of appointment be set aside, and that it be delivered up to the plaintiff to be cancelled, and that neither the defendant Edward Scroggs (the second son) nor any of his issue do insist on or make use of the deed of appointment, or the contents or operation of it, in any court of law or of equity; and his Lordship doth declare, that the settlement executed after the marriage hath unwarrantably departed from the marriage articles, by limiting the estate to the use of such *child* or *children* as should be appointed, instead of limiting the same to such *son* or *sons*, &c. and that the same ought to be rectified; and his Lordship ordered a new settlement to be executed accordingly," and the father was decreed to pay the costs.

No. XI.

Phelp v. *Hay* (*a*).

Rolls, 18th May 1778.

14*th March* 1747.—By the agreement made previously to the marriage between the Rev. Abraham Phelp and Ayliffe Tufton,

After reciting, that upon the treaty for the marriage it was agreed that Ayliffe Tufton should have power, as well before as after such marriage, either to make an absolute sale of her lands and chattels, and with the monies raised by such sale to purchase other lands and chattels any where in England, and convey unto the trustees therein named, their heirs, executors, &c. or unto such other persons as the said Ayliffe Tufton and her mother should nominate, as well all such lands and hereditaments wherein the said Ayliffe Tufton then had an estate of freehold or inheritance in fee simple or fee tail, or for terms of years, or otherwise howsoever, as also such lands and chattels which might be purchased as aforesaid, to and for the use and benefit of the said

(*a*) *Vide supra*, p. 357, 369.

Abraham

Abraham Phelp and Ayliffe Tufton and the issue of their two bodies in such manner and form, and by and after such rates, shares, and proportions either jointly with the said Abraham Phelp, or alone, separate, and apart from him as the said Ayliffe Tufton should think proper and fit to do.

9th and 10th February 1749.—By indentures of lease and release, and by a fine, Mr. and Mrs. Phelp (the marriage having been solemnized) conveyed her 6th part of certain real estates unto Sir George Hay, his heirs and assigns for ever, in trust nevertheless, to the use of the said Abraham Phelp, and Ayliffe his wife, and their assigns during their lives, and the life of the longer liver, remainder to the use of such person and persons, and for such estate and estates as the said Ayliffe Phelp should in manner thereby required, appoint; and in default of such appointment, in trust to, and for the use of the right heirs of the said Ayliffe Phelp for ever. Note.—The fine was declared to be to the use of the said Sir George Hay and his heirs, in trust nevertheless, to, for, and upon the uses and trusts before expressed.

13th Feb. 1755.—By an indenture between Ayliffe Phelp, then the widow of the said Abraham Phelp of the one part, and the said Sir George Hay of the other part. After reciting the articles of 14th March 1747, and the indentures of the 9th and 10th of February 1749, and the fine levied accordingly. And also reciting, that by the indenture of release, a greater power was given to the said Ayliffe Phelp of disposing and limiting her said lands and estates than was given, or intended to be given, to her by the said articles made previous to her marriage, it being the intention of such articles, and of the parties thereto, that the said Ayliffe Phelp should limit, settle, and assure her said lands and estates unto, and upon the issue of the bodies of them the said Abraham Phelp and Ayliffe, in case they should have any such; and the said Ayliffe Phelp having then three children by the said Abraham Phelp, to wit, Charles Tufton Phelp her eldest son, Jane Phelp her daughter, and James Phelp her youngest son, it is witnessed, that for the settling and assuring the said sixth part of the said premises upon the children and issue of the said Ayliffe Phelp by the said Abraham Phelp, according to the said articles of agree-

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ment, the said Ayliffe Phelp, by virtue of the power unto her given, as well by the marriage articles as by the indenture of release, did grant, limit, direct, and appoint that the said Sir George Hay, and his heirs, should from thenceforth stand seised of the said undivided sixth part of the said premises, and that the said fine and the uses thereof should enure to the use of the said Ayliffe Phelp and her assigns for life, remainder, to the use of the said Charles Tufton Phelp, James Phelp, and Jane Phelp, or to any or either of them, their, his, or her heirs, and assigns in such manner and form, and by and after such rates, shares, and proportions, and charged and chargeable with such sum and sums of money, unto and amongst any or either of them the said Charles Tufton Phelp, James Phelp, and Jane Phelp, and at such time and times as she the said Ayliffe Phelp should by any deed, or by her will to be duly executed in the presence of, and attested by three or more credible witnesses, give, grant, devise, limit, direct or appoint; and for want of, and in default of such appointment, to the use of the said Charles Tufton Phelp, James Phelp, and Jane Phelp, and his and their several and respective heirs and assigns as tenants in common, and not as joint tenants.

Charles Tufton Phelp died under age, and without issue.

18th May 1772.—The said Ayliffe Phelp, by her will, duly executed declared her will and meaning to be, and she did thereby by virtue of the proviso aforesaid direct and appoint, that the said Sir George Hay should stand seized of the said sixth part of the said estates, in trust by mortgage to raise and pay thereout to testatrix's daughter, Jane Phelp, her executors, administrators, and assigns, within six months after testatrix's decease, the sum of 2000*l.* and subject thereto, to the use of the said testatrix's son James Phelp, and his assigns for life; remainder to the said Sir George Hay and his heirs during the life of the said James Phelp in trust to preserve contingent remainders, with remainder, after the decease of the said James Phelp, to his issue in general tail; and in default of such issue, to the use of testatrix's daughter Jane Phelp for life; remainder to the said Sir George Hay and his heirs during her life, in trust to preserve contingent remainders, with remainder after the decease of the said Jane Phelp to her issue in general tail,

tail, and in default of such issue, to the use of testatrix's mother, Frances Tufton, and her assigns for her life, with remainder to the testatrix own right heirs, with power for the said George Hay, and his heirs, with the consent of the person for the time being entitled to the estate, to sell the same, and to purchase other lands to be settled to the same uses.

18*th May*, 1778.—By a decree in a cause wherein the said James Phelp was plaintiff, and the said Sir George Hay, and Charles Blicke, and Jane his wife (late Jane Phelp) were defendants. The Master of the Rolls declared, that he was of opinion, that under the will of Ayliffe Phelp, the said Charles Blicke, and Jane, his wife, in her right, were entitled to the sum of 2,000*l.* to be raised by way of mortgage of the estate in question, with interest from six months after testatrix's death; and that subject to such mortgage, the said James Phelp was under the said will entitled to an estate in tail general in the said estate, with remainder to the said Jane Blicke in tail general, and that all the subsequent or other limitations in the said will concerning the said estate were void; and that no valid appointment of such the reversion in fee of the said estate as aforesaid, having been made by the said Ayliffe Phelp, subsequent to the indenture of 13th February 1755, according to the power therein reserved to her, the appointment made by such indenture of 13th February 1755 did, as to such reversion in fee of the said Leicestershire estate as aforesaid, become absolute; and that under the appointment made by the said Ayliffe Phelp by the said indenture of the 13th of February 1755, such reversion in fee of the said estate belonged to her three children, Charles Tufton Phelp, James Phelp, and Jane Blicke, their heirs and assigns as tenants in common, in equal third parts; and that the said Charles Tufton Phelp being dead, intestate, and without issue, his undivided third part descended to the said James Phelp as his brother and heir at law; and that by the means and in manner aforesaid, the said James Phelp was then entitled to him and his heirs to two-third parts of the reversion of the said estate so subject and in manner aforesaid; and the said Jane Blicke to her and her heirs to the remaining third part of such reversion as aforesaid of the said estate.

Various proceedings were had in the cause. The Master found that the legal estate was in the heir of Sir George Hay, and he joined with James Phelp who suffered a recovery of the estate, in a mortgage for securing the 2,000*l.* and interest.

It appears by the register's book (*a*) that the plaintiff submitted to the court that it was the true intent of the articles of 14*th* March 1747, and the indenture of 13th February 1755, that Ayliffe should have power to limit and appoint an estate of inheritance either in fee simple or tail to her issue, but that it was never meant that she should have power to limit any smaller estate for her issue than an estate tail, and that the plaintiff was advised that there was no limitation contrary to the intention, but that he had an estate tail given to him subject to the payment of 2000*l.* The defendant of course submitted the contrary.

No. XII.

Roberts v. *Dixwell.*

Lib. Reg. B. 1738, fol. 119. (*b*)

The limitation was to the use of such of the children of the marriage for such estates, and in such shares and proportions as the husband and wife or survivor should appoint.

The husband having survived his wife by his will, appointed the estate unto the plaintiff, his only son, his heirs and assigns for ever, upon condition that he and they should pay his only sister of the whole blood Elizabeth Mary Roberts 3000*l.* and 50*l.* a year, for maintenance until she attained twenty one, or married, and the testator charged the estates therewith; and in case the plaintiff refused to pay the same, then he appointed the estate itself to the daughter, her heirs and assigns for ever; 2000*l.* to be paid to Elizabeth Mary at twenty-one, or marriage; but if she died before, the said 2000*l.* to be paid to his daughter Mary Roberts by another marriage at twenty-one, or marriage; and he declared

(*a*) Lib. Reg. B. 1777. fol. 537.
Vide supra, p. 362.

the

the 3000*l* to be in satisfaction of the 1000*l*. as stated in 2 Eq. Ca. Abr.

It was decreed, that "the plaintiff was entitled by virtue of the appointment subject to the charge of 2000*l*. part of the sum of 3000*l*. therein charged for Elizabeth Mary, and of 50*l*. a year for her maintenance, and his Lordship doth decree, that the trustees do accordingly convey the same to him so subject as aforesaid, and the defendant Elizabeth Mary is to be at liberty to apply to the court for raising and paying the sum of 2000*l*. when the same shall become due, but his lordship declared that the limitation over of the said sum of 2000*l*. to the said Mary Roberts by the will, is void, and as to the sum of 1000*l*. residue of the said sum of 3000*l*. mentioned in the will, his Lordship declared that the appointment thereof by the said will for satisfaction of a debt due from him by covenant contained in his marriage settlement, was void, and that defendant Elizabeth Mary is intitled to have satisfaction for the sum of 1000*l*. with interest at four per cent. from the death of her father as a special creditor." And the necessary directions were given by the decree accordingly.

No. XIII.

Newport v. *Savage*.

Michaelmas Term 1736. (*a*).

A HAD a power by will to jointure any wife by limiting, &c. to and for her use, or in trust for her in lieu of her jointure, or part of her jointure, all or any part of the estate of which he was tenant for life. A reciting his power, settles in trust for his wife for her jointure the land contained in the power for *ninety-nine years if she should so long live.* It was decreed by the Chancellor, that the power was well executed, and he said, that though in strictness of law this would not have been a good execution of the power, yet a court of equity ought to regard the substance of things. When all parties are mere volunteers, they must be

(*a*) *Vide supra*, p 368.

bound by the law; yet where they are purchasers for a valuable consideration, and the execution is defective, the court will supply it, and it does no injury, for it carries it no further than the person himself might have done: and even in cases of purchasers, the court will in favour of one supply non execution of powers, and the reason of their not doing it generally, is because it does not appear that the intention of the party was to carry the power into execution. It was objected, that this was such an estate that this is no bar of dower, but the power is not to give an estate in bar of dower; but A was left at large to make a provision for his wife. Besides, in the settlement made on her, it is generally said to be in bar of her dower, and therefore as it will be an equitable execution of the power, so it will be an equitable bar of dower.

Upon searching the register's book (*a*), I find that the power was "for Walter when he should have any estate in possession in the premises for his life by virtue of the limitations aforesaid, by any deed, to assign, limit, or appoint to, or for the use of, or in trust for any woman or women that should be his wife for her life in lieu of jointure, all or any part of the premises to take effect from his decease." He limited a term to trustees for 99 years in trust for his wife. The bill was to have the jointure confirmed, and to stay proceedings at law by the remainder-man. The defendant stated a trial at *nisi prius*, and that a case was reserved for the King's Bench, and he prayed for liberty to proceed in the cause. It was decreed that the plaintiff should be quieted in the estate comprised in the jointure deed during so much of the term of ninety-nine years as she should live, and the defendant was to pay unto the plaintiffs, their costs of the suit, and the injunction formerly granted in this cause for stay of the defendant's proceedings at law against the plaintiffs was to be continued.

(*a*) Lib. Reg. 1726, fol. 33.

No.

No. XIV.

Earl of Cardigan v. *Montagu.*

Reg. Lib. A. 1754, fol. 406 (*a*).

This case arose upon a question of election.

It appeared that the late Duke of Montagu under a power contained in his marriage settlement, executed leases to the defendant, Edward Montagu, who executed declarations of trust, declaring such leases to be made in trust for the Duke; and the defendants, prayed an enquiry as to the quantum of the rent, &c. before they were put to their election, and hoped that the court would thereupon, first determine the validity or invalidity of such leases.

Whereupon it was referred to Master Montagu, to look into the several leases which were made by the Duke, to Edward Montagu of the settled estate which were then subsisting, and to enquire what powers were vested in the Duke for leasing the estates, and to state his opinion thereon.

The master by his report, stated that he had enquired what powers were vested in the Duke, and that the only power which was vested in him, was contained in a settlement of Jan. 1704; in the words following. "Provided also, that it shall be lawful for the said Earl Montagu, and John the late Duke, as they should be in possession during their lives respectively by indenture, under his, or their respective hand or hands, and seal or seals, attested by two or more credible witnesses, to make any lease or leases of all those iron works and furnaces, in the City of Southampton, and of all other, the lands, tenements, woods, hereditaments, rights, privileges, and other things, mentioned in, and agreed to be demised by the Earl, by an indenture bearing date the 29th Dec. 1701, and certain deeds therein recited for such term and terms, and under such rents, covenants and agreements as are therein agreed on, or to any person or persons,

(*a*) *Vide supra.* p. 476, 488, 501, 513, 514, 515, 519, 520, 521, 530, 531, 532.

from time to time for any term or number of years, absolute not exceeding thirty-one years, or for any number of years determinable on one, two or three lives in possession or reversion, or by way of future interest, so as there be not in being at one and the same time, any lease or leases for years, absolute for above thirty-one years in the whole, and so as all such leases, determinable on life or lives, be not to continue longer than for three lives, and so as upon every such lease, there be reserved such rents or payments, or more as by the said indentures therein before referred to, was mentioned and agreed to be reserved; and also by any indenture in like manner to be made and attested, to make any lease or leases of any of the said messuages, in the county of Middlesex, for the encouragement of rebuilding the same, for any term or terms not exceeding sixty-one years from the making thereof, at and under the like respective rents as were paid for the same on the first building thereof, or more; and also by any indenture in like manner, to be made and attested, to make any lease or leases of all or any other part or parcel parts, or parcels of the same premises before mentioned, other than the said capital messuage called Ditton-house, and the orchards, gardens, yards and lands limited to the use of the said Lady Mary Churchill, and also other than the aforesaid mansion-house called Boughton-house, with the appurtenances thereof, unto any person or persons for the term of twenty-one years, or for any term or number of years not exceeding twenty-one years, or for any term or number of years determinable upon the death of one, two or three lives in possession, or by way of future interest of such of the said premises as have been usually demised for one, two or three life or lives, or for years determinable upon the death of one, two or three person or persons, so, as such estates granted in possession, and by way of future interest absolute, be not made to continue longer than for twenty-one years, and so, as such terms for years granted, for longer time than twenty-one years, be all made determinable upon the deaths of one two or three persons at the most, and so as upon all such leases, made of such part of the said premises as have been usually let for three lives, or for any term of years determinable upon one, two or three life or lives

lives in possession or by way of future interest as aforesaid, there be reserved to continue due and payable yearly, during such leases, *the ancient, usual and accustomed, rents, loons, heriots, and services usually paid for the same or more,* and so as by and upon all such leases, to be made for twenty-one years or any less term of years absolute, not usually let for life or lives, or for years determinable on lives as aforesaid, there be reserved to continue due and payable yearly, during the continuance of such leases, *the utmost and best improved yearly rent or rents, which at the time of making thereof can or may be reasonably gotten* without fine or other income for the same, and so as in every such lease or leases which shall be made by virtue of any of the powers aforesaid, there be contained a condition of re-entry for non-payment of the said rent or rents thereby to be reserved, and so as such lease or leases be made without impeachment of waste, by express words to be therein contained, and so as the lessee or lessees to whom such lease or leases be made, do execute counterparts thereof."

(1) And the master found twenty-four leases respectively numbered from one to twenty-four, both inclusive, to have been all the leases granted by the Duke under the power, and he stated that he had proceeded to look into them. And he found that the first three of such leases, severally numbered 1, 2 and 3, were each of them made for the absolute term of twenty-one years commencing at Lady Day 1749, and that all the other twenty-one leases were respectively made for the term of ninety-nine years, commencing at Lady Day 1749, if the plaintiffs, Mary Countess of Cardigan, her eldest son, and the Duchess Dowager of Manchester or any of them should so long live, and as to the lease No. 1, whereby the mansion-house called Montagu-house, &c. were demised to Edward Montagu for twenty-one years, absolutely at the yearly rent of 300*l.* payable half-yearly at Michaelmas and Lady Day unto the testator, the late Duke, and the person or persons who for the time being, should be seised of the premises in remainder after him, with a proviso therein contained, that if the Duke should at any time during his life, and the continuance of such lease, pay or tender, or cause

to be paid, or tendered to the said Edward Montagu his executors administrators, or assigns in the dining hall of Gray's-Inn, &c. then the lease and all clauses, &c. therein contained should absolutely determine, and the like proviso or power being inserted in every one of the said twenty-four leases, and no other objection having been made before the said master to the said lease, No. 1. but what arose from such proviso, which objection had been made to every one of the said twenty-four leases, the master conceived that the lease No. 1. notwithstanding such objection was a valid lease, and warranted by the said power of leasing (*b*).

(2) But as to the said lease (No. 2) whereby, not only the honour of Gloucester but likewise sixteen several manors in Northampton, and more particularly the manor of Boughton, and a great walk, and Boughton Park with the Deer therein, together with other lands in Northampton, and also the manor of Beaulieu in Southampton were demised to Edward Montagu for the like term of twenty-one years absolute, at the yearly rent of 600*l.* payable half-yearly as aforesaid, the said master did conceive from the general, extensive, casual and uncertain natures, and values of the greater part, at least of the premises, and the great difficulty if not utter impossibility arising from thence of forming any judgment, whether the rent thereby reserved was the utmost and best improved yearly rent which at the time of making such lease could or might have been reasonably gotten for all the premises, and the rather as there was no exception contained therein of Boughton house, &c. which were expressly excepted out of the said power of leasing; for the said reasons he did conceive that the lease No. 2, was not a valid lease nor warranted by the power (*c*).

(3) And as to the said lease No. 3, whereby the manor of Ditton and Ditton Park, together with a farm called Hams and ten acres of land were demised to Edward Montagu for the like term of twenty-one years at the yearly rent of 290*l.* payable as aforesaid, there being no exception contained in such lease of Ditton-house, &c. limited by the marriage settle-

(*b*) This was acquiesced in.

(*c*) This was acquiesced in.

ment

ment to the use of Lady Mary Churchill for life, which, it was admitted before the said master, were part of the manor of Ditton, and were expressly excepted out of the power of leasing, he did therefore conceive the said lease, No. 3, not to be a valid lease, nor warranted by the power *(a)*.

(4) And as to the lease No. 4, whereby the iron works in the county of Southampton, and also two corn mills, and the land thereto, with other lands, were demised to Edward Montagu for the term of 99 years, determinable on the lives of three several persons therein named, which said iron works and furnaces, and other premises demised, did appear to be a part only of the premises comprised in the indenture of December 1701, referred to in the said power of leasing, and which same part was, by the same indenture, agreed to be separately and distinctly demised, although upon looking into such new lease, No. 4, and comparing the same with the said indenture, and particularly with the articles of agreement therein recited, it did appear that the very same premises were separately and distinctly demised by the said new lease, No 4, and that such and the same rents and payments were thereby reserved as by the said indenture, and the other indentures and articles therein recited were mentioned, and agreed to be reserved, yet the said master found that in the said articles there was contained not only a covenant on the part of the lessee to maintain, keep, and leave the said premises in sufficient repair, but that there were also contained therein several other covenants on the part of the lessee with regard to the time or manner of cutting or felling the several coppices and underwoods, thereby agreed to be demised, the not putting any stock or cattle into such coppice and the like, all in their nature tending to the preservation, good management and improvement of the said premises, and that no such covenants on the part of the lessee were contained in the said new lease, No. 4, and as by the said power of leasing it seemed to be particularly intended that all leases to be made of the said iron works and furnaces, and other the premises mentioned in the aforesaid indenture, or by any of the deeds therein recited

(*a*) This was acquiesced in.

should

should be made, not only under such rents and payments, but likewise under such covenants and agreements as were therein particularly agreed on, and the aforesaid several covenants on the part of the lessee, being wholly omitted in the said new lease, No. 4, for that reason the said master conceived such new lease not to be a valid lease, nor warranted by the power (*b*).

(5) And as to the lease No. 5, whereby Palace farm, and other lands in Bewley were demised to Edward Montagu for the like term of ninety-nine years determinable on the same lives, amongst which premises so demised were contained other part of the premises comprised in the said indenture of the 29th December 1701, and thereby also agreed to be separately and distinctly demised, and although upon looking into such lease, No. 5, and comparing the same with the said indenture of the 29th December 1701, the same rents and payments did appear to be reserved by the said lease No. 5, as by the said indenture of the 29th December 1701, and the indentures, &c. therein recited was mentioned and agreed to be reserved in respect of such part of the said premises as were comprised in the indenture of the 29th December 1701, yet it appearing that such lease, No. 5, did also contain some other lands and premises not comprised in the said indenture of the 29th December 1701, and particularly certain lands therein mentioned, for that reason the said master did conceive that the said lease, No. 5, was not a valid lease, nor warranted by the power (*c*).

(6) And as to the five several leases following, viz. No. 6, No. 7, No. 8, No. 9, and No. 10, whereby certain messuages, &c. were severally demised unto the said Edward Montagu for the like term of ninety-nine years, determinable on the same three lives. It having been objected before the said master that the several farms and premises so as aforesaid, separately demised by the said five several leases, had not been usually demised for one, two, or three lives, or for years determinable upon the death of one, two, or three person or persons, and no old leases, nor any other evidence having been laid before him to shew that such

(*b*) This was acquiesced in

(*c*) This was acquiesced in.

several

several farms and premises had been usually so demised; the said master did for that reason conceive, that none of the said five leases numbered 6, 7, 8, 9, and 10 did appear to be valid leases, or to be warranted by the power (*d*).

(7) But as to the five several other new leases following, viz. No. 11, No. 12, No. 13, No. 14, and No. 15, whereby the messuages, &c. therein mentioned were severally demised to Edward Montagu for the like term of ninety-nine years, determinable upon the same three lives, to maintain and support which said five new leases, five several old leases had been produced before the said master, by which it did appear that the several messuages, &c. so as aforesaid, separately demised by the said five new leases, were in like manner separately demised by the said five old leases, but upon looking into such five old leases, and comparing the same with the five new leases, he found that in each of the said five old leases, or counterparts, and also in each of the said five new leases, there was contained a covenant on the part of the lessee, to bear, pay, and discharge all taxes, rates, duties, and impositions whatsoever; and that in all of the said five old leases, there was also contained a covenant on the part of the lessee to maintain, keep, and leave the demised premises in sufficient repair; and that in some of the said five old leases or counterparts, there were likewise contained covenants on the parts of the lessees to spend and lay upon the demised premises, all the dung, manure, or compost thence arising; and also not to demise, alien, or assign any part of the said demised premises without the licence in writing of the lessor, his heirs, or assigns; but that no such covenants as last mentioned were contained in any of the said five new leases: however, it appearing that the same several and respective, ancient, usual, and accustomed rents, boons, and services which had been usually paid for, and in respect of the several messuages and premises separately demised by the said five new leases were severally reserved by such five new leases, and thereby made to continue due and payable yearly during the continuance of such leases, and no other

(*d*) This was acquiesced in.

particular

particular objection having been made to any of the said five new leases but what arose from the omission of such several covenants as were before mentioned, the said master did conceive, that notwithstanding such objection, the aforesaid five new leases numbered 11, 12, 13, 14, and 15, were each of them valid and effectual leases warranted by the power (*e*).

(8) But as to the remaining nine leases, viz. No. 16, 17, 18, 19, 20, 21, 22, 23, and 24, whereby certain farms, &c. were respectively demised to Edward Montagu for the like term of ninety-nine years, determinable on the same three lives, to maintain and support which nine new leases, nine several old leases or counterparts had been produced before the said master, by which it did appear that the several messuages and premises so as aforesaid separately demised by the said nine new leases, were in like manner separately demised in and by the said nine old leases, but upon looking into such nine old leases, and comparing the same with the nine new leases, the said master found, that in every one of the said nine old leases, there were contained covenants on the part of the lessees to bear, pay, and discharge all taxes, rates, duties, and impositions whatsoever; and also to maintain, and keep, and leave the demised premises in sufficient repair, and that in several of the said nine old leases, there were likewise contained covenants on the parts of the lessees to spend or lay upon the said demised premises, all the dung, manure, or compost thence arising, and also not to demise, alien, or assign any part of the said demised premises without the licence in writing of the lessor, his heirs or assigns, and more particularly in the old lease, bearing date the 20th day of April 1664, produced before him to maintain and support the new lease, No. 19, there was contained a covenant on the tenant's part to grind at the mill of the said lessor, situate in Bewley, all the corn and grain which they should spend in and upon the said demised premises, and that in another old lease bearing date the 20th day of April 1688, produced before the

(*e*) This was not acquiesced in, and the master's opinion in this respect was overruled by reason of the omission of the covenant to repair.

said

said master to maintain and support the new lease, No. 20, there was contained a like covenant on the tenant's part to grind all his corn at the lessor's mill aforesaid, all which covenants on the parts of the said lessees, as they did in their nature tend to the preservation, management, and improvement of the premises demised were for that reason for the benefit, advantage, and security, not only of the immediate lessors, but likewise of all persons claiming after them; but he found that neither the said covenant to bear, pay, and discharge all taxes, &c. nor any of the several other covenants therein before particularly mentioned, were contained in any of the said nine new leases, and that the like covenant for grinding corn in the said mill was not contained in either of the said two new leases respectively numbered 19, 20; and as the said several, ancient, usual, and accustomed rents which were usually paid under the said nine old leases, did by means of the said covenant, for the tenants paying and discharging all rates and taxes, become clear and nett rents, freed from any deduction whatsoever, and for want of such covenants, the several rents reserved by the said nine new leases, must, he conceived, be subject and liable to a deduction thereout, upon account not only of the land-tax, but likewise of other rates and taxes which tended manifestly to the prejudice of the persons who, since the decease of the Duke, had been, or might thereafter be seised of the demised premises. Under those circumstances, the master craved leave to submit to the judgment of the court how far the several rents which appeared to be nominally reserved by the said nine new leases, for the want of such covenants, for the tenants paying and discharging all rates and taxes, could, or ought to be deemed in substance and effect the same several ancient rents as were usually paid by virtue of the said nine old leases, which seemed to be expressly required by the said power of leasing, and consequently whether the said nine new leases were valid leases, and warranted by the power or not, and more particularly whether the said two new leases respectively numbered 19 and 20 were not invalid for want of the like covenants on the tenants part for grinding their corn at the lessor's mill, as were contained in the before mentioned

two

two old leases, the same appearing to be in its nature a boon or service (*k*).

An exception was taken by the defendants to the report, for that the said master had by his report certified, that he conceived that the five several leases therein mentioned by the numbers 11, 12, 13, 14, and 15 were valid leases, and warranted by the power, whereas the defendants insisted that he ought to have certified that the said five leases were not valid leases.

His Lordship held the said defendants said exception to be good and sufficient, and therefore ordered that the same should stand, and be allowed. According to Lord Mansfield's note of this case, the Chancellor took some days to consider; and declared he was clear upon the argument, but took time, because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon was, that the estate must come to the remainder-man in as *beneficial* a manner as ancient owners held it *(l)*.

Upon the special matter of the said report relating to the several new leases from No. 16 to No. 24, inclusive, his Lordship declared, that all the said leases were not warranted by the power, and therefore void.

(*k*) The nine leases were held to be invalid.

(*l*) 1 Burr. 122.

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